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In The
Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and
wife; JAMES ZOBREST, a minor, by LARRY
and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Opinion of Attorney General of Arizona	9
Plaintiffs' Amended Verified Complaint	19
Plaintiffs' Motion for Preliminary Injunction	27
Defendant's Opposition to Plaintiffs' Motion For Preliminary Injunction	29
Order of District Court Denying Preliminary Injunction	52
Defendant's Answer	54
Plaintiffs' Non-Uniform Interrogatories and Defendant's Answers Thereto	58
Affidavit of Sandra Zobrest	63
Stipulation Concerning Substitution of Alternative Affidavit	66
Affidavit of James Santeford	69
Salpointe Documents re Academic Program	81
Stipulation of Facts	86
Reporter's Transcript of District Court Hearing	97
Order and Judgment of District Court	*
Opinion of Court of Appeals	**
Dissenting Opinion, Court of Appeals	***

* Reprinted in Petition For Certiorari, A-35

** Reprinted in Petition For Certiorari, A-1

*** Reprinted in Petition For Certiorari, A-16

TRIAL COURT DOCKET SHEET

TERMED APPEAL

U.S. District Court
U.S. District Court for the District of
Arizona (Tucson)

CIVIL DOCKET FOR CASE #: 88-CV-516

Filed: 8/1/88

Zobrest, et al v. Catalina Foothills

Assigned to: Judge Richard M Bilby

Demand: \$0,000

Nature of Suit: 890

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 20:1401 Education: Handicapped Child Act

LARRY ZOBREST,

Husband

plaintiff

Thomas J Berning, Esq

[COR LD NTC]

Arizona Center for Law
in the

Public Interest

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SANDRA ZOBREST,
Wife
plaintiff

Thomas J Berning, Esq
(See above)
[COR LD NTC]

William Bentley Ball, Esq
(See above)
[COR LD NTC]

JAMES ZOBREST,
a minor, by
Larry and Sandra
Zobrest, his parents
plaintiff

Thomas J Berning, Esq
(See above)
[COR LD NTC]

William Bentley Ball, Esq
(See above)
[COR LD NTC]

v.

CATALINA FOOTHILLS
SCHOOL DISTRICT
defendant

John C Richardson, Esq
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DeConcini, McDonald,
Brammer, Yetwin &
Lacy, P.C.
2525 E Broadway Blvd
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Tucson, AZ 85716-5303
322-5000

- 8/1/88 1 Complaint filed summons issued (nl)
[Entry date 8/3/88]
- 8/1/88 2 Motion by plaintiff for preliminary
injunction (nl) [Entry date 8/3/88]
- 8/3/88 3 Notice of Hearing on plas' motion for
preliminary injunction [2-1] at 1:00pm on
8/12/88. (cc: Berning RMB) (yl)
- 8/3/88 4 Notice of Hearing on plas' motion for
preliminary injunction [2-1] set for
1:00pm on 8/12/88. (yl)

- 8/3/88 5 Notice by plaintiffs of taking depo of
Catalina Foothills School District on the
following date(s): 8/9/88 (yl)
- 8/5/88 6 AMENDED VERIFIED COMPLAINT. (yl)
[Entry date 8/9/88]
- 8/5/88 6 Motion by plaintiffs for preliminary
injunction (within amended verified
complaint. (yl) [Entry date 8/9/88]
- 8/8/88 7 Return of service of summons and
complaint on Catalina Foothills School
District by service on Terry Downey,
principal, on 8/4/88. (nl) [Entry date
8/10/88]
- 8/11/88 8 Motion by defendant Catalina Foothills
to exceed page limitation to opposition
to pla motion for preliminary injunction
(nl) [Entry date 8/12/88]
- 8/11/88 9 ORDER by Judge Richard M. Bilby that
defendant Catalina Foothills School
District be allowed to exceed page
limitation in opposition to plaintiffs'
motion for preliminary injunction. (cc:
RMB, Richardson, Berning) (nl) [Entry
date 8/12/88]
- 8/11/88 10 Response by defendant Catalina Foothills
to motion for preliminary injunction
(within amended verified complaint.
[6-1], motion for preliminary injunction
[2-1] (nl) [Entry date 8/12/88]
- 8/12/88 11 M/E: IT IS ORDERED that motion for
preliminary injunction is denied; formal
order will follow. (cc: Berning,
Richardson, RMB) (nl) [Entry date
8/15/88]

- 8/15/88 12 ORDER by Judge Richard M. Bilby that plaintiffs' motion for preliminary injunction is denied. (cc: all counsel of record, RMB) (nl)
- 8/23/88 13 ANSWER by defendant (kc) [Entry date 8/29/88]
- 8/26/88 14 M/E: (RMB) ORD informal status hearing set for 9:30 9/27/88 Fur Directives to cnsl (cc: Richardson, Berning, RMB) (gg) [Entry date 8/31/88]
- 9/30/88 15 M/E: (RMB) ORD stlmt stat rpt due 10/10/88 and 2/10/89, discovery cutoff due 3/27/89, L/R 42c compliance deadline due 5:00 cnsl file w/ct wit lsts by 2/13/89 (cc: Berning, Richardson, RMB) (gg) [Entry date 10/3/88] [Edit date 4/17/89]
- 11/1/88 17 Notice of service by defendant of req for adms, req to prod and non-uniform interrogs. (gg) [Entry date 11/4/88]
- 11/2/88 16 Notice of service by plaintiffs of req of admissions and non/uni interrogs upon dft. (caf) [Entry date 11/3/88]
- 12/5/88 18 Notice of service by defendant of ans to plas' non-uni interrogs and req for admissions (caf) [Entry date 12/6/88]
- 12/9/88 19 Application for Limited Admissions and ORDER: by Judge Richard M. Bilby that WILLIAM B. BALL may appear and participate in this action as counsel for: plaintiffs (cc: Berning Richardson Ball RMB) (caf) [Entry date 12/13/88]

- 12/22/88 20 Notice of service by plaintiff of ans to req for adm and req for prod of docu (caf)
- 1/3/89 21 Notice of service by plaintiffs of svc of ans to first set of non-uniform interrogs. (gg)
- 2/6/89 22 Notice of service by defendant of 2nd req for adm and non uni interrog (caf) [Entry date 2/8/89]
- 2/13/89 23 Witness list by Dft Catalina Foothills (caf) [Entry date 2/14/89]
- 2/14/89 24 Proposed Witness list by Plas (caf) [Entry date 2/15/89]
- 3/27/89 25 Stipulation to extnd disc ddl (caf) [Entry date 3/28/89]
- 3/27/89 - LODGED: Order re stipulation [25-1] (caf) [Entry date 3/28/89]
- 4/7/89 26 Motion by plaintiffs for summary judgment (caf) [Entry date 4/10/89]
- 4/7/89 27 Notice of Hearing setting motion for Pla's summary judgment [26-1 at 2:30 on 7/14/89 (caf) [Entry date 4/10/89]
- 4/7/89 28 Stipulation (Statement) of facts by plaintiff in support of motion for summary judgment [26-1] (caf) [Entry date 4/10/89]
- 4/7/89 29 Motion by plaintiff to exceed page limitation re: memo p/a re: mtns for sum jgm (caf) [Entry date 4/10/89]
- 4/7/89 - LODGED: Order re motion to exceed page limitation re: memo p/a re: mtns

- for sum jgm [29-1] (caf) [Entry date 4/10/89]
- 4/7/89 - LODGED: memo of p/a in supt of pla's mtn for sum jgm (caf) [Entry date 4/10/89]
- 4/10/89 30 M/E: ORD tht Local Rule 42 compliance date previously set for 5/30/89 is VACATED and will be reset by the ct after ruling on the mtn for sum jgm (cc: Berning Richardson Ball RMB) (caf)
- 4/10/89 31 Stipulation to admit exhibits a,b,c and d as evidence (caf)
- 4/10/89 32 ORDER by Judge Richard M. Bilby granting motion to exceed page limitation re: memo p/a re: mtns for sum jgm up to 18 pgs (caf) [Entry date 4/12/89]
- 4/10/89 33 Memorandum of p/a by plaintiffs in support of motion for summary judgment [26-1] (caf) [Entry date 4/12/89]
- 4/11/89 - LODGED: Order re stipulation [31-1] (caf) [Entry date 4/12/89]
- 4/13/89 34 ORDER by Judge Richard M. Bilby granting stipulation that Salpointe Docs, cps attached to stip, may be adm into evidence and filed w/ct as part of recd. (gg) [Entry date 4/17/89]
- 4/27/89 35 Motion by defendant for summary judgment (caf) [Entry date 4/28/89]
- 4/27/89 36 Rule 11 Statement of facts by defendant in support of motion for summary

- judgment [35-1] (caf) [Entry date 4/28/89]
- 4/27/89 37 Notice of Hearing setting motion for summary judgment [35-1] at 2:30 on 7/17/89 (caf) [Entry date 4/28/89]
- 5/10/89 38 Opp (Response) by defendant to Pla's motion for summary judgment [26-1] (caf) [Entry date 5/12/89]
- 6/5/89 39 Memo of p/a (A) in oppo (Response) by plaintiff to dft's motion for summary judgment [35-1] (B) in Reply to dft's oppo to plas' motion for summary judgment [26-1] (kc) [Entry date 6/6/89]
- 6/6/89 40 Stipulation concerning subst of alternate afdt (kc) [Entry date 6/7/89]
- 6/6/89 41 Plas' Affidavit of Sandra Zobrest (kc) [Entry date 6/7/89]
- 6/20/89 42 Reply memo by defendant in suppt of its motion for summary judgment [35-1] (kc)
- 7/17/89 43 M/E: HRG: Mtms for sum jgm. ORD taking under advisement the mtms for sum jgm on 7/17/89 (caf) [Entry date 7/20/89]
- 7/19/89 44 ORDER by Judge Richard M. Bilby granting Dft's x- motion for summary judgment [35-1] and denying Pla's motion for summary judgment [26-1] and this action is DISMISSED (caf) [Entry date 7/20/89]
- 7/20/89 45 JUDGMENT: ORD and ADJ tht jgm is entered in favor of the Dft and agnst the Pla (caf)

- 8/7/89 46 Notice of appeal by plaintiffs Larry Zobrest, Sandra Zobrest & James Zobrest from Dist. Court decision judgment (45-1), order (44-1) cc: 9CCA/All Counsel (as) [Entry date 8/8/89]
- 8/7/89 - Received \$105.00 appeal fee appeal [46-1] (as) [Entry date 8/8/89]
- 8/11/89 - Docket Fee Notification form sent to 9CCA appeal [46-1] (as)
- 8/11/89 - Certificate of Record Transmitted to 9CCA cc: All Counsel (as)
- 8/23/89 - Notification by 9CCA of Appellate Docket Number appeal [46-1] 89-16035 (as) [Entry date 8/24/89]
- 8/24/89 47 Transcript Designation and Ordering Form, filed 8/24/89. (as)
- 8/25/89 48 Court Reporter's Transcript of Proceedings for the following date(s): 7/17/89 (Re: Cross-Motions for Summary Judgment) (as) [Entry date 8/28/89]
- 8/28/89 - Amended Certificate of Record Transmitted to 9CCA cc: All Counsel (as)
- 9/1/89 49 CA ORDER re Certificate of Record/ Transcript Designation Ordering Form (as) [Entry date 9/6/89]

[SEAL]

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert E. Corbin

June 27, 1988

The Honorable Stephen D. Neely
 Pima County Attorney
 Civil Division
 32 N. Stone, Suite 1500
 Tucson, Arizona 85701-1412

Re: I88-072 (R88-059)

Dear Mr. Neely:

Pursuant to A.R.S. § 15-253(B) we have reviewed your April 26, 1988 opinion to the Assistant Superintendent of Catalina Foothills School District and concur with your conclusion that a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates the First Amendment of the Federal constitution and art. II, § 12 of the Arizona Constitution.

Sincerely,

/s/ Bob Corbin
 BOB CORBIN
 Attorney General

BC:LSP:pnw

[Seal]

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

JAMES M. HOWARD
CHIEF DEPUTY

OFFICE OF THE
Pima County Attorney
Civil Division

32 N. STONE
SUITE 1500

Tucson, Arizona 85701-1412
(602) 622-6621

OPINION NO. 88-04

TO: Terry Downey, Assistant Superintendent
Catalina Foothills School District

FROM: JoAnn Sheperd
Deputy County Attorney

DATE: April 26, 1988

RE: Request for Legal Opinion

QUESTION PRESENTED

You have requested a legal opinion as to whether the school district may provide the services of an interpreter for a deaf student if that student chooses to attend a parochial high school. You have also informed me that this high school is not the only suitable placement for this student, but is the one chosen by the student and his parents as offering the most desirable educational environment. In addition, the parents have agreed to pay for

an interpreter's services during religious instruction classes.

ANSWER

See body of opinion.

DISCUSSION

I. The Education of the Handicapped Act.

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. §1400 *et seq.*, provides federal money to state and local agencies to assist in the education of handicapped children. This funding is conditioned upon each state's compliance with comprehensive goals and procedures.

In a 1982 opinion, the U.S. Supreme Court described the Act as:

(A)n ambitious federal effort to promote the education of handicapped children, . . . passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out'.'

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 179, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), quoting H.R. Rep. No. 94-332, p. 2 (1975) (H.R. Rep.).

Congress, by its statutory declaration of policy as set forth in 20 U.S.C. §241(a), recognized that not all handicapped children from educationally deprived areas

attend public school and therefore it was "necessary to include eligible children attending private school among the beneficiaries of the Act." *Wheeler v. Barrera*, 417 U.S. 402, 405-406, 41 L.Ed.2d 159, 94 S.Ct. 2274 (1974). The Act therefore focuses on the identification and evaluation of all handicapped children and requires that participating state and local educational agencies provide necessary services, including a free and appropriate public education "tailored to the unique needs of the handicapped child," *Rowley*, 458 U.S. at 176.

Federal regulations promulgated in accordance with the Act address the issue of parental placement of handicapped children in private schools. 34 C.F.R. §300.403 provides in pertinent part:

- (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§330.450-330.460.

34 C.F.R. §300.452 addresses the responsibilities of a "local educational agency", providing that:

- (a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

"Local educational agency" is defined in 20 U.S.C. §244(6)(B) as including:

(A) public board of education . . . legally constituted within a State for either administrative control or direction of . . . public elementary or secondary schools in a . . . county . . . school district, or other political subdivision of a State . . .

"Related services" is defined in 34 C.F.R. §300.13 as:

- (a) (T)ransportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education . . .

The Act and its accompanying regulations do not expressly require that services be provided on the premises of a private school or, for that matter, on the premises of a public school; nor do they require a public agency to concede to parental wishes regarding specific programs and placement. The regulations do provide administrative procedures whereby parents are able to challenge services, programs and financial responsibility. See 34 C.F.R. §300.403(b).

II. Constitutional Interpretation of the Act

The U.S. Supreme Court has analyzed whether the provision of certain services by a public school district, pursuant to the Act, to a handicapped student attending a private parochial school constitutes a violation of the Establishment Clause of the First Amendment of the U.S. Constitution, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

In constructing its analysis, the Court has examined the constitutionality of various remedial and enrichment programs implemented to provide assistance to elementary and secondary education students enrolled in nonpublic schools, applying the test first set down in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 92 S.Ct. 2105 (1971). The *Lemon* test provides that in order for a statute to be upheld in the face of an Establishment Clause challenge, it must (1) have a secular purpose; (2) have a principal or primary effect that neither advances or inhibits religion; and (3) not foster an excessive entanglement of government with religion. *Id.* at 612, 613.

The Court recently applied this test in companion cases decided in 1985, both of which involved the constitutionality of publicly-financed educational programs provided to nonpublic school students. In the first case, *Grand Rapids School District v. Ball*, 473 U.S. 373, 87 L.Ed.2d 267, 105 S.Ct. 3216 (1985), the Court invalidated the provision of certain publicly-sponsored remedial and supplementary programs which were conducted on sites leased from and located on private school property, finding that the programs had the primary or principal effect of advancing religion. In the facts of that case, students moved between religious school instruction and remedial or supplementary classes, the latter two being taught by public school employees on the premises of the parochial school. The Court held that this program resulted in a "symbolic union of government and religion in one sectarian enterprise", constituting an impermissible effect under the Establishment Clause. *Id.* at 392.

In the companion case, *Aguilar v. Felton*, 473 U.S. 402, 87 L.Ed.2d 290, 105 S.Ct. 3232 (1984), the Court invalidated a program in which a city used federal monies to pay the salaries of public employees providing instruction to educationally deprived children in nonpublic schools, on the basis of excessive entanglement of government with religion.

In *Meek v. Pittenger*, 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975), the Supreme Court considered the constitutionality of a law which authorized the State of Pennsylvania to loan public school textbooks to children attending nonpublic schools. The statute also authorized loans by the state of instructional materials and equipment, plus the provision of certain "auxiliary services", directly to the nonpublic schools. These "auxiliary services" included counseling, testing, psychological services, speech and hearing therapy and certain other related remedial services.

The Court invalidated the state's provision of instructional materials and equipment to nonpublic schools, even though the items were nonsectarian in nature, holding that when state aid:

(F)lows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . (it) has the impermissible primary effect of advancing religion,

at 366.

It also prohibited the provision of the auxiliary services, which utilized public employees, as these employees,

(A)re performing important educational services in schools in which education is an integral part of the dominant sectarian mission and *in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.* (Emphasis added).

Id. at 371.

Arizona courts have not yet been confronted with the particular issue you have presented. However, Article 2, §12 of the Arizona Constitution provides:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

The Arizona Attorney General concluded in Op.Atty.Gen. No. 180-62 that the rendering of special education services which are characterized as "therapeutic", or which involve teaching or counseling on parochial school premises, results in a violation of the Establishment Clause. The opinion cites *Wolman v. Walter*, 433 U.S. 229, 53 L.Ed.2d 714, 97 S.Ct. 2593 (1977), in which the Court examined various provisions of a state statute which allowed the expenditure of public funds for aid to nonpublic school students. The Court specifically addressed the issue of whether various services could be provided on the premises of parochial schools and concluded that while the provision of diagnostic services on-site is permissible, therapeutic service delivery on parochial school premises violates the Establishment Clause. Of particular significance is the distinction made by the Court between diagnostic and therapeutic services:

First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

Id. at 244.

Analogizing this holding to the issues your question has raised, it appears appropriate to characterize an interpreter as more akin to a therapist or a teacher than a diagnostician. The very nature of an interpreter's role requires that he or she "step into the shoes" of the teacher in order to convey all information disseminated in class to the hearing-impaired student. The interpreter therefore becomes "closely associated with the educational mission of the nonpublic school," as set forth in *Wolman, supra*.

Conclusion

Although federal and state law clearly require the provision of special education and certain related services to handicapped students attending nonpublic schools, it is equally clear that the provision of certain of these services pursuant to this mandate violates portions of

both the United States and Arizona Constitutions. In light of the U.S. Supreme Court's holdings in *Wolman* and *Meek, supra*, excessive entanglement of state and church may well result if a publicly-funded interpreter provides a conduit for the transmission of sectarian views to a student attending a nonpublic parochial school, "in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek*, 421 U.S. at 371.

A copy of this opinion has been submitted to the Attorney General for his review, pursuant to A.R.S. §15-253(B).

Respectfully submitted,
STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By: /s/ JoAnn Sheperd
JoAnn Sheperd
Deputy County Attorney

APPROVED:

/s/ David G. Dingeldine
David G. Dingeldine
Chief Civil Deputy County Attorney

CC: Robert Corbin, Esq.
Arizona Attorney General
Anita Lohr
County School Superintendent

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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST and	)	No. CIV 88-516
SANDRA ZOBREST,	)	TUC(RMB)
husband and wife; JAMES	)	AMENDED VERIFIED
ZOBREST, a minor, by	)	COMPLAINT
LARRY and SANDRA	)	(Preliminary
ZOBREST, his parents,	)	Injunction
	)	Requested)
Plaintiffs,)	
v.	)	(Filed Aug. 5, 1988)
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
)	
Defendants.)	
_____)	

Plaintiffs, by counsel state for their amended cause of action as follows:

I. JURISDICTION AND PARTIES.

1. In this action the plaintiffs seek preliminary and permanent injunctions requiring the defendant, Catalina Foothills School District to furnish interpreter services to a deaf child enrolled in a nonpublic religious school

pursuant to the Education for Handicapped Children Act, 20 U.S.C. § 1401 et. seq. (hereinafter EHA).

2. This Court has jurisdiction to decide this action and to grant the requested relief pursuant to 20 U.S.C. § 1415(4)(A) and 28 U.S.C. §§ 2201 and 2202, and Rule 65 of the Federal Rules of Civil Procedure.

3. Plaintiffs are Larry Zobrest and Sandra Zobrest, husband and wife, and their minor son, James Zobrest, who brings this action by and through his parents and general. All plaintiffs reside in Tucson, Arizona within the boundaries of defendant Catalina Foothills School District.

4. Defendant is the Catalina Foothills School District. Defendant school district is a political subdivision of the State of Arizona and is properly named a defendant pursuant to A.R.S. § 15-326(1).

5. The plaintiff James Zobrest is a child 14 years old, who has been profoundly deaf since birth. He is enrolled in Salpointe Catholic High School, Tucson, and will enter the ninth grade thereof at the opening of the coming term, August 17, 1988.

II. FACTUAL ALLEGATIONS.

6. The plaintiff James Zobrest and his parents, plaintiffs Larry Zobrest and Sandra Zobrest, are individuals of the Roman Catholic faith.

7. The plaintiff James Zobrest will fulfill the requirements of the Arizona compulsory school attendance statute, A.R.S. § 15-802, through attendance at Salpointe Catholic High School.

8. The plaintiff parents of James Zobrest will pay full tuition for his education at Salpointe Catholic High School, but they are unable to afford to hire a certified sign language interpreter for him in order that he may participate in classes at the school.

9. Plaintiff James Zobrest is a "handicapped person" within the meaning of the EHA, 20 U.S.C. 1401(a). He resides within the boundaries of defendant school district and is entitled to receive services from it.

10. Defendant Catalina Foothills School District is a "local educational agency" under the terms of the EHA.

11. As a "local educational agency" defendant Catalina Foothills School District is required by the EHA and the regulations issued thereunder to "provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency."

12. "Related services," within the meaning of the EHA, includes development, corrective and other supportive services.

13. The services of interpreters for deaf persons are supportive services, and are indispensable to this deaf child's ability to function in a classroom. Such services are neither diagnostic nor therapeutic.

14. A certified interpreter for the deaf is a neutral conduit, akin to a hearing aid, for the transmission of orally delivered language into sign language and from sign language into orally delivered language. A certified interpreter for the deaf is forbidden by the Register of Interpreters For the Deaf, Inc. Code of Ethics of his or her

profession from engaging in teaching or the explaining of information during the course of performing interpreting for a deaf person.

15. The plaintiffs, in October 1987, formally requested the defendant school district to furnish the services of a certified interpreter to the plaintiff James Zobrest.

16. The defendant school district referred plaintiffs request to the Pima County Attorney and the County Attorney issued an opinion on April 26, 1988 that the furnishing by the school district of such services to a deaf child enrolled in a parochial school would be violative of the Arizona and United States Constitutions.

17. On May 12, 1988, the opinion was referred to the Attorney General of Arizona with respect to whether the plaintiff James Zobrest could be denied the services of an interpreter by the school district solely on the ground of his enrollment in a religious school of conscientious choice.

18. On June 27, 1988, the Attorney General affirmed, without opinion, the conclusion of the defendant school district's attorney. This information was forwarded to plaintiffs on July 12, 1988.

19. Because of defendants' denial of the requested service plaintiffs have been forced to retain the services of legal counsel.

20. Unless the relief here sought is granted, the plaintiff parents and child may be forced to forsake the

religious education for their child which their conscientious beliefs require, which religious education is available to their son at Salpointe Catholic High School, a school wherein he can fulfill the compulsory attendance requirements of law. Without issuance of a preliminary injunction plaintiff James Zobrest may not be in a position to attend school at Salpointe Catholic in the fall and may not be able to benefit from special education.

21. The plaintiffs have no adequate remedy at law and will suffer immediate irreparable injury unless a preliminary and permanent injunction is granted.

22. Plaintiffs cannot avail themselves of the administrative "due process" procedures provided by 20 U.S.C. § 1415 because there is insufficient time for them to do so prior to the start of the school year and to attempt to do so would be futile. Additionally, defendants failed to provide plaintiffs with the required written notice that would have timely informed them of their rights to "due process" under the EHA.

III. CAUSES OF ACTION.

23. Plaintiffs reallege and incorporate by reference all allegations previously set forth in this complaint.

24. Defendants' denial of the requested interpreter services to the plaintiff James Zobrest violates the EHA by depriving the said James Zobrest of related services of which, by the terms of the EHA, he is an intended beneficiary.

25. Defendants failed to provide appropriate written notice to the plaintiffs of their due process rights

under the EHA and as a result the plaintiff child James Zobrest may not receive an appropriate education this fall.

26. Defendants' denial of the requested interpreter services to the plaintiff child James Zobrest is violative of their rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

27. Defendants' denial of the requested interpreter services to the plaintiff child James Zobrest imposes upon him and his parent plaintiffs an unconstitutional condition, *i.e.*, that they may enjoy participation in a public benefit only on the condition that they forego exercise of their First Amendment right to the free exercise of their religion.

WHEREFORE, plaintiffs request that this Court grant them judgment as follows:

1. That pursuant to Rule 65 of the Federal Rules of Civil Procedure a preliminary injunction, mandatory in character, pending trial of the issues, be granted to the plaintiffs against the defendant, requiring the defendant to furnish the services of a qualified interpreter to the plaintiff James Zobrest at the Salpointe Catholic High School commencing August 17, 1988.

2. That the plaintiffs be granted a permanent injunction requiring defendants to furnish the services of a qualified interpreter to the plaintiff James Zobrest at Salpointe Catholic High School.

3. That should plaintiff James Zobrest miss any education as a result of defendant's violation of his rights under the EHA, he be granted compensatory education.

4. That plaintiffs' attorneys be awarded reasonable costs and fees pursuant to 20 U.S.C. § 1415.

5. For such other and further relief as the Court deems just and proper.

VERIFICATION

[illegible]

SANDRA ZOBREST, being first duly sworn, upon her oath, deposes and says:

She is a named plaintiff and mother to James Zobrest, the minor named plaintiff in the above-entitled action and as such is entitled to verify the foregoing Amended Complaint; she has read the foregoing Amended Complaint and is familiar with the contents thereof, and the foregoing Amended Complaint is true to the best of her knowledge, except as to those matters stated upon information and belief, and as to those, she believes them to be true.

Further affiant sayeth not.

/s/ Sandra Zobrest
SANDRA ZOBREST

SUBSCRIBED AND SWORN to before me this 5th
day of August, 1988 by SANDRA ZOBREST.

/s/ Lisa K. Maier
Notary Public

My Commission Expires:

9-21-90

DATED this 8th day of August, 1988.

/s/ Tom Berning
Tom Berning
Arizona Center for Law
in the Public Interest
3208 East Fort Lowell
Suite 106
Tucson, Arizona 85716
Attorneys for Plaintiffs

Copies of the foregoing mailed
this 8th day of August, 1988 to:

Catalina Foothills School District
2101 East River Road
Tucson, Arizona 85718

/s/ _____

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(602) 327-9547

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST and	)	No.
SANDRA ZOBREST,)	
husband and wife; JAMES	)	MOTION FOR
ZOBREST, a minor, by	)	PRELIMINARY
LARRY and SANDRA	)	INJUNCTION
ZOBREST, his parents and)	
guardians <i>ad litem</i> ,)	
Plaintiffs,)	
v.)	
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
Defendants.)	
_____)	

Plaintiffs move and request that this Court, grant them a preliminary injunction requiring defendant school district to provide the services of a qualified sign language interpreter to plaintiff James Zobrest at Salpointe Catholic High School during the 1988-89 school year.

This motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure and the Education for

Handicapped Children Act, 20 U.S.C. § 1401 et. seq. and is supported by reference to the Verified Complaint, the attached Memorandum of Points and Authorities and the testimony to be presented at hearing on the matter.

DATED this 8th day of August, 1988.

/s/ Tom Berning
 Tom Berning
 Arizona Center for Law
 in the Public Interest
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 Attorneys for Defendant

UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST, husband and wife;)	
JAMES ZOBREST, a minor,)	No.
by LARRY and SANDRA)	
ZOBREST, his parents,)	
Plaintiffs,)	OPPOSITION TO
vs.)	PLAINTIFFS'
CATALINA FOOTHILLS)	MOTION FOR
SCHOOL DISTRICT,)	PRELIMINARY
Defendant.)	INJUNCTION
_____)	

For the reasons set forth in the attached Memorandum of Points and Authorities, the Defendant, Catalina Foothills School District, requests the Court to deny Plaintiffs' Application for Preliminary Injunction.

DATED this 11th day of August, 1988.

DeCONCINI McDONALD
BRAMMER YETWIN & LACY

By /s/ John C. Richardson
John C. Richardson
Gary F. Urman
2525 E. Broadway, Ste. 200
Tucson, Arizona 85716-5303
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

The primary question presented by the present action is whether the provision of a sign language interpreter in a parochial school by a public school district is violative of the establishment clause of the First Amendment.

Plaintiffs assert that, pursuant to the Education for Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* ("EHA"), Catalina Foothills School District (the "District") must furnish a sign language interpreter for James Zobrest, their son, who plans to enroll this fall at Salpointe Catholic High School ("Salpointe"), a Catholic High School. Although James has attended District schools for the last three years, his parents now claim it is a tenet of their faith to have their child educated in a parochial school, and that the District's legal inability to provide a sign language interpreter somehow will violate their rights to free exercise of religion.

James Zobrest, who will be entering the ninth grade this fall, is profoundly deaf. James' individualized education program ("IEP") presently does not provide for

James' attendance in a parochial classroom with the services of a sign language interpreter. For as long as James has attended District schools in the regular classroom, the District has provided for James the services of a sign language interpreter. In October or November of 1987, Plaintiffs orally notified the District that James intended to attend Salpointe the following fall. At that time or sometime thereafter, Plaintiffs requested the District to provide a sign language interpreter for James at Salpointe because such aid would be indispensable to his ability to function in a classroom. Contrary to the allegations contained in Plaintiff's Complaint, the District informed the Zobrests that, although it would be happy to provide an interpreter for James in a public school, it would be necessary to determine whether provisions of an interpreter at Salpointe was legally permissible. Testimony to be presented at the hearing in this matter will establish that at no time did the District unconditionally agree to provide a sign language interpreter for James at a parochial school.

The District referred the matter to the Pima County Attorney's Office which issued an opinion on April 26, 1988, stating that the District's provision of interpreter services on the premises of a parochial school would violate both the United States Constitution and the Arizona State Constitution. This opinion was later affirmed by the Arizona Attorney General. Attorney General Opinion 188-072 (June 27, 1988). The opinion of the Arizona

Attorney General was forwarded to the Zobrests on July 11, 1988.¹

Salpointe is a Roman Catholic high school. The 1987-1988 Parent-Student Handbook includes in its expression of "Philosophy and Objectives of Salpointe Catholic High School" a statement that

Salpointe Catholic High School is a community of parents, faculty, staff and students dedicated to living and perpetuating the mission of Jesus Christ, serving the young people of the Tucson Metropolitan area who desire a Catholic education. Salpointe Catholic High School 1987-1988 Parent Student Handbook, at p. 6, attached hereto as Exhibit A.

Lay teachers are hired at Salpointe because, in addition to their qualifications to teach at a college preparatory high school, they profess their faith. Prayers are said regularly at the school.

James is scheduled for six classes this fall. The teachers of three of these classes will be nuns. Under these circumstances, and for the reasons set forth below, an order by this Court of a preliminary injunction

¹ Plaintiffs suggest that they were kept in the dark with respect to a response to their request that the District provide an interpreter for James, and that they somehow were prejudiced by not receiving a "formal" response until July 11, 1988. On the contrary, testimony at the preliminary injunction hearing will demonstrate that Plaintiffs continually were informed regarding the status of their request, were aware of the April 26, 1988, opinion of the Pima County Attorney's Office, and received copies of all correspondence related to their request.

requiring the District to provide interpreter services in a parochial school is inappropriate.

The District acknowledges that a court must consider the total effect of four criteria when determining whether a preliminary injunction is proper:

- (1) The significance of the threat of irreparable harm to the plaintiff if the injunction is not granted;
- (2) The state of the balance between this harm and the injury that granting the injunction would inflict upon the Defendant;
- (3) The probability that Plaintiff will succeed on the merits; and
- (4) The public interest involved.

Wright & Miller, *Federal Practice and Procedure*, § 2948, pp. 430-31 (1973). With respect to each of these criteria, Plaintiffs bear the burden of establishing that the balance of the equities tips in their favor. *Riely v. United Bank of Arizona*, 397 F.Supp. 557 (D.Ariz. 1975), affirmed, 562 F.2d 56 (9th Cir. 1977); *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 626 P.2d 1115 (App. 1981). As will be established in the following Memorandum, Plaintiff has failed to demonstrate, and is legally unable to demonstrate, that the facts of this case warrant an order of preliminary injunction.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY MAY SUCCEED ON THE MERITS OR THAT THEY CAN OVERCOME ESTABLISHMENT CLAUSE PROHIBITIONS.

The District questions whether the proper scope of inquiry for the purposes of a preliminary injunction, as

set forth by Plaintiffs, is whether Plaintiffs possess a "fair chance of success," particularly when, as here, Plaintiffs' showing of irreparable harm is insufficient to justify a preliminary injunction in any event. See Argument II, below.² Rather, the circumstances of this case suggest that, in order to obtain injunctive relief, Plaintiffs must demonstrate at least a strong likelihood of success on the merits. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980). In any event, the existent facts and legal principles reveal that Plaintiffs' chance of success on the merits is minimal, if at all.

The District admits that the EHA requires it to provide for James, as part of a free appropriate public education, the services of a sign language interpreter, so long as James is educated in a non-parochial setting. However, the establishment clause of the First Amendment, which prohibits the public support or promotion of religion, prohibits the publicly funded provision of interpreter services in a Catholic high school. Accordingly, because the District legally is not permitted to provide the relief requested by Plaintiffs, preliminary injunctive relief should be denied.

The landmark decision in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), provides three

² The District believes the required showing of probable success on the merits rests on a sliding scale: as the showing of irreparable harm decreases, the requisite showing of probability of success on the merits increases. *Justice v. National College Athletic Association*, 577 F.Supp. 356 (D.Ariz. 1983).

tests for analyzing the constitutionality of any governmental action with respect to the establishment clause. Government action is improper if it fails any one of the following three tests: (1) the action must have a secular purpose; (2) the action must not have the primary effect of advancing religion; and (3) the action must not create excessive entanglement between church and state. 403 U.S. at 612-613; 915 S.Ct. at 2111, 29 L.Ed.2d at 755. A review of judicial decisions applying these standards indicates that the provision of an interpreter by the District in a parochial classroom fails to meet the one or more of the three prongs of the *Lemon* analysis, and therefore would be violative of the establishment clause.

A. The Application of the EHA in This Case Has The Impermissible Effect of Promoting Religion.

Plaintiffs allege that District funded interpreter services for a parochial school student is permissible simply because the EHA, which mandates the provision of interpreter services in non-parochial schools, serves a secular purpose and has a secular effect. Plaintiffs apparently fail to consider however, that the application of the EHA in the manner Plaintiffs request, and under the circumstances of the present case, has the impermissible effect of advancing religion.

In *Bowen v. Kendrick*, ___ U.S. ___, 108 S.Ct. 2562, 65 U.S.L.W. 4818 (1988), the Supreme Court explicitly recognized that a constitutional challenge based on the establishment clause could be one which was limited to the validity of the statute as it applied to a particular circumstance, without challenging the statute as a whole:

There is, then, precedent in this area of constitutional law for distinguishing between the validity of a statute on its face and its validity in particular applications.

65 U.S.L.W. at 4821. See also *Hunt v. McNair*, 413 U.S. 743, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973). Accordingly, the District need not challenge the constitutionality of the EHA as a whole.

Although EHA as a whole does have the admittedly secular purpose of assuring that all handicapped children will have available to them a free appropriate public education with the related services necessary to accommodate their unique needs, as applied in this case, a publicly funded interpreter in classes at Salpointe has the unconstitutional effect of promoting the religious mission of the school. The only purpose Plaintiffs assert for James' enrollment at Salpointe is to further James' religious education and development. The provision of a District paid sign language interpreter at Salpointe, particularly when James has available to him several public high schools that are able to provide handicap-related services equal or superior to those offered at Salpointe, will have the specific effect of promoting James' religious development – at government expense. As such the application of the EHA to these facts has the impermissible effect of providing government assistance for the specific purpose of advancing James' religious development.

The District emphasizes that, in general, the provision of a sign language interpreter to assist the education of a deaf student is a laudable and necessary government activity. However, the Supreme Court has stated in

Hunter v. McNair, 413 U.S. 743, 93 S.Ct. 2868, 37 L.Ed.2d 923, 931 (1973), that,

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . .

James has at his disposal the services of an interpreter at any neighboring *non-parochial* high school he chooses to attend. It is apparent from Plaintiffs' pleadings in this matter that James would attend one of these high schools, but for his desire to develop religiously in a parochial setting. While the District applauds James' desire to develop spiritually, it is not permitted to affirmatively assist him with his spiritual development.

B. The Provision of a District Funded Interpreter at Salpointe Creates Excessive Entanglements Between Church and State.

It is well recognized that, for the purposes of an establishment clause inquiry, a parochial school is a "pervasively sectarian" institution. *Bowen v. Kendrick*, 56 U.S.L.W. at 4827. Hence, the provision by the District of a sign language interpreter for James in his classes at Salpointe will inject impermissibly a government presence in this sectarian setting.

Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1752, 44 L.Ed.2d 217 (1975), addresses directly the question of providing "speech and hearing services" to parochial schools. The Court there held that the state funded provision of professional staff to provide speech and hearing

services violated the Establishment Clause because they were performed on the premises of the school and the only guard against the sectarianization of that work was the "good faith" and "professionalism" of the professional. The decisions of the Court have made it clear that such reliance is not enough to ensure a strict non-ideological posture would be maintained.³ 421 U.S. at 368-399, 44 L.Ed.2d at 233-234.

The Plaintiffs cite *Witters v. Washington Department of Services for Blind*, 474 U.S. 41, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), to argue that the EHA does not have the primary effect of advancing religion. *Witters* involved a blind person who was seeking financial assistance under the state vocational rehabilitation program for the blind. The blind person intended to use the financial assistance to enroll in a Christian educational institution with the express purpose of becoming a pastor or missionary. The Court ruled the aid should go to him because the vocational assistance was provided directly to the individual and not to the sectarian school and hence any benefit to the sectarian school was attenuated.

Witters is inapposite because the aid given to *Witters* was merely financial aid and did not bring the government into the classroom. In *Witters*, once the student received his financial assistance payment, the government presence disappeared. In the present case, a public

³ In the present case, because sign language interpreters are required by their code of ethics to sign all communications without comment on editorial adjustments, there is no way to avoid the communication of religious concepts through the government-funded interpreter.

employee is asked to be present daily in a parochial classroom to transmit and communicate all topics of discussion, including religious discussions that occur in class. The issue in the present case is not whether the state is advancing religion by providing tuition which the student uses to enter a religious institution, as was presented in *Witters*. The issue here is whether the government may provide instructional or material aid in the classroom of a parochial high school which is "dedicated to living and perpetuating the mission of Jesus Christ." 1987-88 Salpointe Catholic High School Parent Student Handbook at p. 6, a copy of which is attached hereto as Exhibit C.

Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), and *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), are more on point. In *Grand Rapids*, certain taxpayers challenged two programs adopted by a public school district in which teachers were provided to nonpublic schools to teach supplementary classes. The great majority of those nonpublic schools were sectarian. The programs were struck down by the Court based on the premise that:

At the religious schools here - as at the sectarian schools that have been the subject of our past cases - "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the school's existence. Within that institution, the two are inextricably intertwined." . . . *Grand Rapids*, 473 U.S. at 388, 87 L.Ed.2d at 280.

In *Wolman v. Walter*, certain taxpayers in Ohio challenged, under the Establishment Clause, a statute which authorized public funds for, among other things, supplying

nonpublic school children with instructional materials and equipment. The Court struck down the provisions of the statute which provided instructional materials and equipment in parochial schools, holding that because the very purpose of many sectarian schools is to provide an integrated secular religious education, the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. *Wolman v. Walter*, 433 U.S. at 249-250, 53 L.Ed.2d 733. "In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part to support the religious role of the schools." 433 U.S. at 250, 53 L.Ed.2d at 734.

The facts of this case do not indicate that at Salpointe there can be a clear distinction between secular and sectarian educational functions. At Salpointe, James will attend classes taught by three nuns and three by lay teachers, each of whom may have been hired in whole or in part on the basis of his or her unique qualifications to combine education and ministry. Although Plaintiffs agree to pay the cost of an interpreter during religion class, it is reasonable to assume that lectures and discussions in James' other classes will be injected with religious references and topics, all of which would be communicated to James by a publicly-employed individual present in the classroom.

The precedents demonstrate that the Supreme Court has refused to permit government services such as a sign language interpreter to be present in a parochial classroom. Accordingly, Plaintiffs' action should not succeed on the merits and Plaintiffs' petition for preliminary injunction relief should be denied.

II. NO IRREPARABLE HARM IS THREATENED.

Plaintiff's only allegation of irreparable harm is that James will be unable to develop religiously if his parents are unable to afford the cost of providing James interpreter services at Salpointe. It should be emphasized that Plaintiffs do not allege that James will receive an inferior education in a public high school.⁴ Not only is Plaintiffs' allegation of harm unwarranted, but it is insufficient to support a preliminary injunction.

Until this matter is ultimately resolved in a proper trial or other proceedings, James is free to enroll in a public high school, and to obtain therein all of the interpreter services he requires. It is simply not reasonable to assert that James' religious development depends so much on attendance at Salpointe and that James has no other suitable non-governmental sources for spiritual development.⁵

Moreover, James and his parents have a suitable legal remedy under the EHA. Judicial decisions have established the right of Plaintiffs to enroll James at Salpointe

⁴ On the contrary, Defendant suggests that any one of the neighboring public high schools, which are supported by public funds and which have considerable experience in educating and accommodating the needs of handicapped students, is capable of servicing James' handicap in a manner at least equal if not superior to that of Salpointe.

⁵ The District notes that Plaintiffs' emphasis on the importance of attending Salpointe for spiritual development for the purpose of alleging irreparable harm is inconsistent with its later argument that the provision of government services in the parochial high school will not impermissibly entangle church and state.

and provide interpreter services at their own expense. If Plaintiffs ultimately prevail in this action, they may be entitled to reimbursement from the District for the additional cost of an interpreter incurred. *See Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985) *cert denied*, 473 U.S. 906, 105 S.Ct. 3529, 87 L.Ed.2d 653 (1985), *cert denied*, 474 U.S. 918, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985); *S-1 By and Through P-1 v. Spangler*, 650 F.Supp. 1427 (M.D.N.C. 1986); *Adams Central School Dist. No. 090, Adams County v. Deist*, 334 N.W.2d 775, 214 Neb. 307 (1983), supplemented 338 N.W.2d 591, 215 Neb. 284, *cert denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983). In the meantime, however, it is inappropriate for Plaintiffs to expect the District to finance James' interpreter services at Salpointe where Plaintiffs possess adequate alternatives and legal remedies to mitigate the ultimate effect of any alleged (albeit insubstantial) harm.

The District is astounded that Plaintiffs allege that James is being denied his First Amendment rights to free exercise of his religious beliefs. The District has placed no prohibitions on James' practice of his religious beliefs. Moreover, the District has not dictated that James should not attend Salpointe High School. On the contrary, the District supports James' decision to attend the school of his choice and provided a letter of recommendation in support of his application for admission to Salpointe. Letter of Terry T. Downey dated December 10, 1987, attached hereto as Exhibit B. The District asserts only that it may not permissibly expend public funds to affirmatively support James' attendance at a parochial high

school.⁶ *Cf. Lyng v. Northwest Indian Cemetery Protective Association*, ___ U.S. ___, 108 S.Ct. 1319, 99 L.Ed.2d 534, 56 U.S.L.W. 4292 (1988) (Free Exercise clause did not require government to prohibit or forego profitable timber harvesting and road construction in area traditionally used for religious purposes by members of three American Indian tribes).

III. A PRELIMINARY INJUNCTION WOULD PLACE UNDUE HARDSHIP UPON THE DISTRICT AND WOULD VIOLATE PUBLIC POLICY.

Plaintiffs' summary conclusion that a preliminary injunction would cause the District no harm is misplaced. The District faces substantial and undue hardship if it is required to comply with a preliminary order to provide interpreter services at Salpointe High School.

The present litigation arises out of the good faith efforts of the District to comply with the directives of the Pima County Attorney and the Arizona Attorney General. Reliance on the Opinion of the Attorney General

⁶ Plaintiffs have not alleged any factual or doctrinal basis for their claim that the practice of the Roman Catholic faith requires attendance at a parochial high school. However, even if attendance at a parochial high school somehow is deemed a credal requirement, Plaintiffs have not demonstrated that District action has forced them to disregard their religious views and modify their behavior. James has attended public schools for at least the last three years. This pattern establishes one of two things. Either Plaintiffs' religious beliefs do not require attendance in parochial schools, or they have already made the choice not to follow such a doctrine. Accordingly, Plaintiffs' free exercise arguments are without merit.

provides the basis for insulating the members of the District Governing Board from personal liability for the improper expenditure of public funds to support sectarian activities. A.R.S. § 15-381(B).

Moreover, the grant of a preliminary injunction in this case, prior to a final determination of the parties' rights and responsibilities, may foreseeably result in other inappropriate demands from District students and residents for the provision of handicap-related services not necessary to the provision of a free appropriate public education, or demands for the provision of additional funds, services and facilities to support religious causes. These potential consequences, when considered in relation to the nonexistent claims of hardship by Plaintiffs, mandate a denial of preliminary injunction relief to Plaintiffs.

Finally, the legislative policy underlying the EHA tips the scale of equitable considerations in favor of the District. The administrative regulations promulgated pursuant to the EHA provide that during the pendency of any administrative or judicial proceedings regarding a complaint, the student involved must remain in his or her present educational placement. 34 C.F.R. § 300.513. There is no provision in James' IEP for the provision of a publicly-funded sign language interpreter in a parochial classroom. In effect, then, Plaintiffs' request for a District funded interpreter at Salpointe constitutes a request for a change in placement. As such, federal regulations mandate that, while this controversy is pending, James' placement not change.

Without regard to the Constitutional prohibition against church-state entanglements, and the obvious public policy considerations raised thereby, the legislative and administrative intent of the EHA is that James' placement (*i.e.*, receipt of an interpreter in a non-parochial classroom) remain as it is. Accordingly, public policy requires that Plaintiffs' request for a preliminary injunction be denied.

IV. PLAINTIFFS HAVE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Plaintiffs acknowledge that "a plaintiff must exhaust his administrative remedies under the EHA prior to bringing suit in federal court." Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction p.14. Under certain limited circumstances, either the parents of a handicapped child or the educational institution may bypass the administrative procedures prescribed by the EHA where exhaustion of the administrative remedy would be futile or inadequate. The burden, however, is upon the party seeking to avoid the administrative procedure to demonstrate the futility or inadequacy of administrative review. *Honig v. Doe*, ___ U.S. ___, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 U.S.L.W. 4091 (1988). Plaintiffs have not, however, in this case met the burden of demonstrating such futility or inadequacy.

In their Complaint and in their Application for a Preliminary Injunction, Plaintiffs request the Court to order the District to provide a sign language interpreter so James may attend a parochial high school. Plaintiffs

incorrectly contend that they need not pursue any administrative remedies because the administrative procedure could not be completed by the time school resumes. The mere fact that administrative review takes time, however, does not alone constitute inadequacy or futility. Similarly, Plaintiffs' claim that the District's written notification that a sign language interpreter would not be provided for attendance at Salpointe did not comply with the notice requirements of the EHA does not excuse Plaintiffs' failure to pursue their administrative remedies. Therefore, preliminary injunctive relief should be denied because Plaintiffs' Complaint is subject to dismissal for failure to exhaust administrative remedies.

A. There Is No Showing That Exhaustion Of Administrative Remedies In This Case Would Be Futile Or Inadequate.

It is undisputed that Plaintiffs requested no due process or other hearing procedures pursuant to the EHA prior to commencing the present action. Moreover, Plaintiffs do not dispute that, as a general rule, the failure to exhaust administrative remedies provided as part of an entitlement to appropriate special education under the EHA requires dismissal of a lawsuit brought by allegedly aggrieved parents. *See, Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982), cert denied 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981); *Davenport v. Rockbridge County School Board*, F.Supp. 132 (W.D. Va.1987); *Daniel B. v. Wisconsin Department of Public Instruction*, 581 F.Supp. 585 (E.D. Wis. 1985), affirmed 776 F.2d 1051 (7th Cir. 1985). As Plaintiffs

correctly point out in their Memorandum, under circumstances where exhaustion of administrative remedies would be futile or inadequate, the failure to exhaust administrative remedies does not bar an action in court. Plaintiffs do not point out, however, that a finding of futility or inadequacy most commonly involves situations where a meaningful process of administrative review does not exist, or is improperly administered or otherwise defective, or where the complained of action involves a question of the adequacy of the procedures. *See, e.g., Kerr Center Parents' Association v. Charles*, 572 F.Supp. 448 (D.Or. 1983), supplemented 581 F.Supp. 166 (D.Or. 1983); *Davis v. District of Columbia Board of Education*, 522 F.Supp. 1102 (D.D.C. 1981), reconsideration denied, 530 F.Supp. 1209 (D.D.C. 1982); *Garrity v. Gallen*, 522 F.Supp. 171 (D.N.H. 1981); *Gary B. v. Kronin*, 542 F.Supp. 102 (N.D. Ill. 1980); *Andre H. by Lula H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y. 1985). Although there have been a few decided cases not based on a claim of defective administrative procedures which have excused an aggrieved party from pursuing administrative remedies prior to filing an action in court, these cases are based on unique actual circumstances. This type of exceptional situation is not present in the case now before this Court. Plaintiffs are unable to make any showing that pursuing administrative remedies in this situation would be either futile or inadequate.⁷

⁷ Regulations promulgated pursuant to the EHA provide that Plaintiffs may request a hearing to challenge a change in placement or a refusal to change placement pursuant to parental request. 34 C.F.R. § 300.506. These hearings are required to be conducted before an impartial hearing officer, 34 C.F.R.

The District's decision to deny Plaintiffs' request for an interpreter for classes at a Catholic high school was based on the opinion of the Pima County Attorney. A copy of that opinion was supplied to Plaintiffs. It was the opinion of the Pima County Attorney that the District could not constitutionally provide the services requested by Plaintiff "if a publicly funded interpreter provides a conduit for the transmission of sectarian views to a student attending a non-public parochial school." Opinion of the Pima County Attorney, Opinion No. 88-04 dated April 26, 1988, a copy of which is attached to Plaintiffs' Verified Complaint. The justification for this conclusion, as explained in that Opinion, is that the provision of such services may result in excessive entanglement of church and state. Whether provision of a sign language interpreter for James while he attends Salpointe would actually result in such excessive entanglement presents a factual issue which could, and should, be reviewed in an administrative proceeding. Specifically, issues such as whether, and to what extent, religious discussions or indoctrination occur in the course of ordinary academic instruction easily could be considered and decided in administrative proceedings. Because Plaintiffs have failed to exhaust their administrative remedies, their Complaint must be dismissed.⁸

§ 300.507, and may be appealed to the state educational agency before proceeding to litigation. 34 C.F.R. § 300.510. There is no suggestion that these administrative procedures are insufficient to afford Plaintiffs the proper due process protections without first resorting to litigation.

⁸ Plaintiffs suggest that they somehow are excused from the Due Process requirement because they received the District's

B. Plaintiffs Are Not Excused From The Administrative Review Process Due To Inadequate Notice.

Plaintiffs seem to contend the District's notification to Plaintiffs of its decision not to provide an interpreter for James if he attends Salpointe was technically defective, therefore excusing them from the requirement that they exhaust administrative remedies prior to filing a court action. If this is Plaintiffs' position, for various reasons, they are incorrect.

Plaintiffs seem to argue that they need not pursue administrative remedies because the notification they were given did not specifically describe the available administrative procedures. The authority cited for this proposition, *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), affirmed and modified; *Honig v. Doe*, ___ U.S. ___, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 U.S.L.W. 4091 (1988), is

notice after July 11, 1988, because they allege they were unaware of their rights, and because Plaintiffs allege they received no other written communications in this matter. Despite Plaintiffs' protestations, however, they were continuously and periodically informed by the District of the status of the legal inquiries into their request, and Plaintiffs received copies of all correspondence related to this matter. Moreover, the fact that the "final" notice was not prepared until July 11, 1988, does not affect Plaintiffs' ability to request a due process hearing at any time before or after the July 11, 1988, notice. Finally, Plaintiffs had notice of their rights under the EHA, many of which were stated on a Review of Placement form for James which was signed by Sandra Zobrest on February 10, 1988. See Review of Placement dated February 10, 1988, attached hereto as Exhibit A.

distinguishable from this case and does not legally support Plaintiffs' position. In *Doe v. Maher*, the school district reduced a handicapped student's schedule from full time to half time because of the student's misconduct, but *completely* failed to notify the student's guardians of the change or of any available safeguards or avenue for review. In the present situation, Plaintiffs were fully advised of the District's decision and of the reasons for that decision.

Moreover, the District gave Plaintiffs notice that adequately complied with the EHA. See, *Gregg B. v. Board of Ed. of Lawrence School District*, 535 F.Supp. 1333 (E.D.N.Y. 1982). In *Gregg B.*, a letter to the parents' attorney that the child's placement at a particular school would not be recommended because the school did not have state approval was held to comply with the notice requirements of the EHA. In addition, even if the notice was technically defective because it did not specifically describe the available review procedures, this was not prejudicial to the Plaintiffs. The Plaintiffs admit in their Memorandum that they became aware of the review procedures when they retained counsel, if not earlier. This was within days or weeks of receiving the July 11, 1988, notification from the District, assuming Plaintiffs did not retain counsel prior to receiving District notification. During the time that Plaintiffs prepared and filed the present complaint and lengthy petition for injunctive relief, they could have invoked the due process procedures prescribed pursuant to the EHA. Therefore, it is inconceivable that the Zobrests suffered any prejudice, even if there had been a technical defect in the notice. Considering the alternative avenues of relief available to

Plaintiffs, which as a matter of law and judicial policy should be pursued prior to litigation, Plaintiffs' request for preliminary injunctive relief is inappropriate.

For the foregoing reasons, Defendant Catalina Foothills School District respectfully requests that Plaintiffs' petition for preliminary injunctive relief be denied.

DATED this 11th day of August, 1988.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By /s/ John C. Richardson
John C. Richardson
Gary F. Urman
2525 East Broadway
Suite 200
Tucson, Arizona 85716-5303
Attorneys for Defendants

Copy of the foregoing hand
delivered this 11th day of
August, 1988, to:

Honorable Richard M. Bilby
Chief Judge
55 East Broadway
Tucson, Arizona 85701

Tom Berning
Arizona Center for Law in
the Public Interest
3208 East Ft. Lowell
Suite 106
Tucson, Arizona 85716

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LARRY ZOBREST and)	
SANDRA ZOBREST husband and	)	NO. CIV 88-516
wife, etc., et al	)	TUC-RMB
Plaintiffs,)	
	)	ORDER
vs.	)	(Filed
CATALINA FOOTHILLS	)	Aug. 15, 1988)
SCHOOL DISTRICT,)	
Defendants.)	
_____)	

This Order contains the Court's disposition of the Plaintiffs' Motion for Preliminary Injunction taken under advisement following the hearing on August 12, 1988.

Based upon the stipulated facts in the record, the Court holds that the Motion must be denied on the ground that there is no likelihood of success on the merits. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980).

In reaching this holding, the Court determines that the role of the sign language interpreter is more analogous to that of a therapist than to that of a diagnostician. The interpreter would be more involved in the pervasively sectarian environment and would be the conduit of both sectarian and nonsectarian information. Therefore, this practice would impermissibly violate the separation of church and state. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

Therefore, IT IS ORDERED that the Plaintiffs' Motion for Preliminary Injunction is DENIED.

DATED this 12 day of August, 1988.

/s/ Richard M. Bilby
RICHARD M. BILBY
United States District Judge

DeCONCINI McDONALD BRAMMER YETWIN & LACY
 A PROFESSIONAL CORPORATION
 ATTORNEYS AT LAW
 2525 EAST BROADWAY BOULEVARD, SUITE 200
 TUCSON, ARIZONA 85716-5303
 (602) 322-5000

John C. Richardson, Esq.
 State Bar No. 005606
 Attorneys for Defendant

UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST husband and wife;)	
JAMES ZOBREST, a minor, by	)	No. CIV 88-516
LARRY and SANDRA ZOBREST,	)	TUC-RMB
his parents,)	
)	
Plaintiffs,	)	ANSWER
)	
vs.)	
)	
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
)	
Defendants.)	
_____)	

Defendant Catalina Foothills School District, whose correct name is Catalina Foothills School District No. 16 of Pima County, by and through counsel undersigned, answers Plaintiffs' Complaint as follows:

1. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' Complaint, and therefore denies same.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' Complaint, and therefore denies same. Defendant denies that the Court may grant an injunction under these circumstances.

3. Defendant admits the allegations contained in Paragraphs 3 and 4 of Plaintiff's Complaint, except that Defendant's proper name is Catalina Foothills School District No. 16 of Pima County.

4. In response to paragraph 5 of Plaintiffs' Complaint, Defendant is without information sufficient to form a belief as to James Zobrest's enrollment in Salpointe Catholic High School, and therefore denies same. Defendant admits the remaining allegations contained in Paragraph 5 of Plaintiffs' Complaint.

5. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 6, 7 and 8 of Plaintiffs' Complaint, and therefore denies same.

6. Defendant admits the allegations contained in Paragraphs 9 and 10 of Plaintiffs' Complaint.

7. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 11, 12, 13 and 14 of Plaintiffs' Complaint, and therefore denies same.

8. Defendant denies the allegation contained in Paragraph 15 of Plaintiffs' Complaint, as it is worded. Defendant affirmatively admits that, in October or November of 1987, Plaintiffs orally requested the District

to furnish James Zobrest the services of a sign language interpreter.

9. Defendant admits the allegations contained in Paragraph 16 of Plaintiffs' Complaint.

10. Defendant admits the allegations contained in Paragraph 17 of Plaintiffs' Complaint.

11. Defendant admits the allegations contained in Paragraph 18 of Plaintiffs' Complaint.

12. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' Complaint, and therefore denies same.

13. Defendant denies the allegations contained in Paragraphs 20, 21, and 22 of Plaintiffs' Complaint.

14. In response to Paragraph 23 of Plaintiffs' Complaint, Defendant realleges all admissions, denials and allegations as set forth herein.

15. Defendant denies the allegations contained in Paragraphs 24, 25, 26 and 27 of Plaintiffs' Complaint.

16. Defendant denies all allegations not specifically admitted herein.

17. Defendant affirmatively alleges that it is without legal authority to provide to Plaintiffs the services requested in Plaintiffs' Complaint, and that Plaintiffs have failed to state a claim upon which relief may be requested.

18. As affirmative defenses, Defendant alleges illegality, failure to exhaust administrative remedies, and

any other matter which should be asserted as an affirmative defense which is uncovered during discovery in this case.

WHEREFORE, Defendant requests as follows:

1. That Plaintiffs take nothing by their Complaint and that the Complaint be dismissed;

2. That the Court award to Defendant its costs incurred herein; and

3. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 23rd day of August, 1988.

DECONCINI McDONALD BRAMMER
YETWIN & LACY P.C.

By /s/ John C. Richardson
John C. Richardson
2525 East Broadway
Suite 200
Tucson, Arizona 85716-5303
Attorneys for Defendant

Copy of the foregoing mailed
this 23rd day of August,
1988, to:

Arizona Center for Law
in the Public Interest
3208 East Ft. Lowell
Suite 106
Tucson, Arizona 85716
Attorneys for Plaintiffs
0822880400.GFU. 880457

Tom Berning - #005370
 Arizona Center for Law
 in the Public Interest
 3208 East Fort Lowell
 Suite 106
 Tucson, Arizona 85716
 (602) 327-9547

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT FOR ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST, husband and wife;)	
JAMES ZOBREST, a minor,	)	No. CIV 88-516
by LARRY and SANDRA)	
ZOBREST, his parents,	)	NON-UNIFORM
	)	INTERROGATO-
Plaintiffs,	)	RIES
v.)	
CATALINA FOOTHILLS	)	AND ANSWERS
SCHOOL DISTRICT,	)	THERETO
Defendants.)	

TO: DEFENDANT AND THEIR ATTORNEY OF
 RECORD, JOHN RICHARDSON

Pursuant to Rule 33 of the Federal Rules of Civil
 Procedure you are hereby requested to answer in writing
 and under oath within 30 days of service hereof the
 interrogatories contained on the attached Exhibit 'A'.

DATED this 1st day of Nov., 1988.

/s/ Tom Berning
Tom Berning

Arizona Center for Law
 in the Public Interest
 3208 East Fort Lowell
 Suite 106
 Tucson, Arizona 85716

Attorney for Plaintiffs

A copy of the foregoing was mailed first
 class postage pre-paid this 1st day
 of Nov., 1988 to:

John Richardson
 DeConcini, McDonald, Brammer,
 Yetwin & Lacy, P.C.
 2525 East Broadway
 Tucson, Arizona 85716-5303

/s/ T. Berning

EXHIBIT 'A'

1. Please state factual basis for the defense of "ille-
 gality" as stated in paragraph 18 of defendant's Answer.

James Zobrest attends Salpointe Catholic High School, a
 private-parochial school, and has requested Defendant to
 provide him the services of a sign language interpreter
 while at that school. Pursuant to the establishment clause
 of the first amendment to the United States Constitution,
 it is unlawful for the District to provide James Zobrest the
 services of a sign language interpreter at Salpointe Catho-
 lic High School.

2. Please state the reasons why defendant refuses to provide plaintiff James Zobrest with a certified sign language interpreter at Salpointe High School.

See answer to Interrogatory No. 1, above.

3. Please list each exhibit which defendant intends to utilize in evidence at the trial on the merits in this matter.

See Attachment A

4. Please list the name, address, phone number, and occupation of each person defendant intends to call as a witness at the trial on the merits in this matter.

See Attachment A

5. If you have denied any of plaintiffs' Requests for Admissions which have been served contemporaneously with these interrogatories, please explain the reason why you have denied the request.

See Attachment B

6. Does defendant school district have any written policies concerning the provision of special education services for district children attending parochial schools? No. The only school policies located by the Defendant School District following a brief review of its policy book relating to religious instruction at all are attached. Plaintiff is free to review the policy book of the Defendant School District at any reasonable time with advance notice. Counsel for the Defendant School District will maintain a copy of this policy book in his office.

7. If the answer to interrogatory No. 6 is in the affirmative, please summarize the written policy.

See answer to number 6 above.

8. Do defendants believe that plaintiffs' decision to enroll James Zobrest at Salpointe Catholic High School is not motivated by a sincere religious belief? No. If the answer is yes, please explain the factual basis for defendant's belief.

ATTACHMENT B

Answer to Interrogatory No. 5: —

In response to Request for Admission No. 4, Defendant admits that Plaintiff James Zobrest is a handicapped person within the meaning of EHA and thus, to the extent required by the EHA and to the extent permitted in light of constitutional limitations such as the First Amendment to the United States Constitution, he is entitled to receive special education services. The Defendant School District denies that Plaintiff is entitled to receive certain special education services at Salpointe High School (such as the provision of an interpreter) because such action would violate the first amendment to the United States Constitution.

In response to Request for Admission No. 5, Defendant Catalina Foothills School District admits that Plaintiff James Zobrest requires the services of a sign language interpreter in order to "benefit" from the regular classroom instruction he receives. James Zobrest does not use an interpreter during the special education instruction.

/s/ John C. Richardson
John C. Richardson

/s/ Lesley A. Jenner
Notary Public

Mr. William B. Ball
BALL SKELLY MURREN & CONNELL

LARRY ZOBREST and) No. CIV 88-516
SANDRA ZOBREST, husband) TUC-RMB
and wife; JAMES ZOBREST,)
a minor, by LARRY and) AFFIDAVIT
SANDRA ZOBREST, his) (Filed June 6, 1989)
parents,)
Plaintiffs,)
v.)
CATALINA FOOTHILLS)
SCHOOL DISTRICT,)
Defendants.)

2. My husband, my child, James, and I are members of the Roman Catholic Church and believers in the faith and teachings of the Church.

3. Our son James is now 15 years of age and has arrived at what we deem to be the most critically important time of his life, the most sensitive of his formative years. We believe that the high school years are a stage of a child's life when his character, moral outlook, and religious beliefs are principally formed. Today it is unfortunately a time when all of those things are threatened, more than they ever were, by evils which are rampant in our society.

4. While we were content to have our son enrolled in a public, non-religious school during part of his grade school years, we believed it essential to enroll him in a school of our religious faith for his high school years.

5. Salpointe Catholic High School is a pervasively religious school which, while providing an education to children which meets all state standards, also inculcates the moral and religious principles of the Catholic Faith.

6. While a public high school has been available to us, we have enrolled our son at Salpointe for this religious reason, in that, we have no choice. Salpointe Catholic High School is not a mere matter of preference for us: we are forced, by our religious conscience, to choose that school for James. It is also our sons religious preference that he attend Salpointe.

7. James is a handicapped child. He has been profoundly deaf since birth. Since he can hear nothing, he cannot participate in schooling without the services of an interpreter using sign language. The need for such services are reflected on his latest Individual Education Plan (IEP). I was present when the IEP was drafted and signed. A copy is attached as Exhibit "A".

8. In October, 1987, my husband and I requested that, pursuant to the provisions of federal and state law for educational aid to the handicapped, the Catalina Foothills School District furnish James, at Salpointe Catholic High School, the services of a certified sign language interpreter. The School District has declined on the basis of an opinion of the Attorney General of Arizona, that the furnishing of such services on the premises of a religious school, is forbidden by the United States and Arizona Constitutions.

9. As a consequence my husband and I have been forced to hire a certified sign language interpreter for our son. The cost of this to us is somewhat over \$7,000 per year. We pay \$2,000, per year for tuition and an additional sum for books, supplies, etc. Salpointe Catholic High School, which is not supported by public funds, cannot afford to provide interpreter services to our son.

/s/ Sandra Zobrest
Sandra Zobrest

STATE OF ARIZONA)
COUNTY OF PIMA)

SUBSCRIBED AND SWORN TO before me this 30 day of May 1989.

/s/ Carla Johns
NOTARY PUBLIC

My Commission Expires:

DeCONCINI McDONALD BRAMMER YETWIN & LACY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2525 EAST BROADWAY BOULEVARD SUITE 200
TUCSON, ARIZONA 85716-5303
(602) 322-5000

John C. Richardson, Esq.
State Bar No. 005606
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LARRY ZOBREST and	)	No. CIV 88-516
SANDRA ZOBREST,	)	TUC RMB
husband and wife;)	
JAMES ZOBREST, a minor,	)	STIPULATION
by LARRY and SANDRA	)	CONCERNING
ZOBREST, his parents,	)	SUBSTITUTION OF
	)	ALTERNATE
Plaintiffs,	)	AFFIDAVIT
)	
v.)	
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
)	
Defendants.)	
)	

The parties to this action, by and through their attorneys, hereby stipulate and agree as follows:

1. Plaintiffs have recently filed a Motion for Summary Judgment. Along with the filing of such Motion, Plaintiffs filed an Affidavit of Sandra Zobrest dated February 17, 1989 (the "Original Affidavit").

2. Counsel for Defendant has informed counsel for Plaintiffs that Defendant contests certain language in the Original Affidavit concerning the alleged economic impact upon Plaintiffs of being required to pay for a sign language interpreter for James Zobrest. Counsel for Defendant has discussed with counsel for Plaintiffs the possible need to engage in additional discovery on the issue of Plaintiffs' financial status so as to enable Defendant to attempt to contest the facts relating to this issue contained in the Original Affidavit.

3. Both parties agree that discovery on this issue would be expensive, time consuming, and undesirable. Both parties also agree that the statements contained in the Original Affidavit about which Defendant objects, whether accurate or inaccurate, are unnecessary for a resolution of this action.

4. The parties therefore agree that Sandra Zobrest will submit to the Court a revised affidavit omitting the language about which Defendant has raised a concern (the "Revised Affidavit"). The Revised Affidavit will omit the final two sentences of Paragraph 9 of the Original Affidavit, but in all other respects be identical thereto. The parties further agree that for the purpose of this litigation, the Original Affidavit shall be considered withdrawn and shall no longer be considered to have any force or effect.

5. By executing this Stipulation, Defendant Catalina Foothills School District neither admits nor denies the accuracy or inaccuracy of any other statement or conclusion contained in the Original or Revised Affidavits of Sandra Zobrest. By executing this Stipulation and the

Revised Affidavit, the Plaintiffs neither admit nor deny the accuracy or inaccuracy of any statement in the Original Affidavit.

DATED this 30th day of May, 1989.

DeCONCINI McDONALD
BRAMMER YETWIN & LACY,
P.C.

By _____
John C. Richardson
2525 East Broadway,
Suite 200
Tucson, Arizona 85716-5303
Attorneys for Defendant

DATED this 30th day of May, 1989.

ARIZONA CENTER FOR LAW IN
THE PUBLIC INTEREST

By _____
Tom Berning
3208 East Fort Lowell,
Suite 106
Tucson, Arizona 85716
BALL, SKELLY, MURREN &
CONNEL

By _____
William B. Ball
511 North Second Street
P.O. Box 1108
Harrisburg, Pennsylvania 17108
Attorneys for Plaintiffs

AFFIDAVIT

STATE OF ARIZONA)
) ss
County of Pima)

I, James Santeford, being first duly sworn, do hereby depose and say:

1. I am *twenty-three years of age.
2. I reside at 5502 South Santa Cruz, Tucson, Arizona 85706.
3. Since August, 1988 I have been employed by Sandra and Larry Zobrest as a sign language interpreter for their son James Zobrest.
4. I interpret for James while he is engaged in activities at Salpointe Catholic High School. I also interpret for James during his extra-curricular activity of basketball for Salpointe.
5. I have been certified as a Level III sign language interpreter by the Interpreter Quality Assurance System (IQAS). This is the only entity in Arizona that certifies sign language interpreters for the deaf. IQAS is affiliated with the Registry of Interpreters for the Deaf, Inc. (RID, Inc.). A copy of my certification card is attached hereto as Exhibit "A".
6. In my capacity as a sign language interpreter I adhere to the Code of Ethics set forth by RID, Inc. Attached hereto as Exhibit "B" are copies of the Code of Ethics and the Code of Professional Conduct published by RID, Inc., which I follow in my interpreting activities.

Further affiant sayeth not.

Dated this 30th day of March, 1989.

/s/ James Santeford
James Santeford

Subscribed and sworn to before me this 30th day of
March, 1989.

/s/ Olivia Hanson
Notary Public

OFFICIAL SEAL
OLIVIA HANSON
NOTARY PUBLIC STATE OF ARIZONA
PIMA COUNTY
My Comm. Expires Sept. 30, 1992

Appendix A

Registry of Interpreters for the Deaf, Inc. Code of Ethics

The Registry of Interpreters for the Deaf, Inc. refers to individuals who may perform one or more of the following services:

Interpret

Spoken English to American Sign Language
American Sign Language to Spoken English

Transliterate

Spoken English to Manually Coded English/
Pidgin Sign English

Manually Coded English/Pidgin Sign English to
Spoken English
Spoken English to paraphrased non-audible
spoken English.

Gesticulate/Mime, etc.

Spoken English to Gesture, Mime, etc.
Gesture, Mime, etc., to Spoken English

The Registry of Interpreters for the Deaf, Inc. has set forth the following principles of ethical behavior to protect and guide the interpreter/transliterator, the consumers (hearing and hearing-impaired) and the profession, as well as to ensure for all, the right to communicate.

This Code of Ethics applies to all members of the Registry of Interpreters for the Deaf, Inc. and all certified non-members.

While these are general guidelines to govern the performance of the interpreter/transliterator generally, it is recognized that there are ever increasing numbers of highly specialized situations that demand specific explanation. It is envisioned that the R.I.D., Inc. will issue appropriate guidelines.

CODE OF ETHICS

INTERPRETER/TRANSLITERATOR SHALL KEEP ALL
ASSIGNMENT-RELATED INFORMATION STRICTLY
CONFIDENTIAL.

Guidelines:

Interpreter/transl iterators shall not reveal information about any assignment, including the fact that the service is being performed.

Even seemingly unimportant information could be damaging in the wrong hands. Therefore, to avoid this possibility, interpreter/transliterators must not say anything about any assignment. In cases where meetings or information becomes a matter of public record, the interpreter/transliterators shall use discretion in discussing such meetings or information.

Exhibit "B"

If a problem arises between the interpreter/transliterators and either person involved in an assignment, the interpreter/transliterators should first discuss it with the person involved. If no solution can be reached, then both should agree on a third person who could advise them.

When training new trainees by the method of sharing actual experiences, the trainers shall not reveal any of the following information:

name, sex, age, etc., of the consumer

day of the week, time of the day, time of the year the situation took place

location, including city, state or agency

other people involved

unnecessary specifics about the situation

it only takes a minimum amount of information to identify the parties involved.

INTERPRETER/TRANSLITERATORS SHALL RENDER THE MESSAGE FAITHFULLY, ALWAYS CONVEYING THE CONTENT AND SPIRIT OF THE SPEAKER, USING

LANGUAGE MOST READILY UNDERSTOOD BY THE PERSONS(S) WHOM THEY SERVE.

Guidelines:

Interpreter/transliterators are not editors and must transmit everything that is said in exactly the same way it was intended. This is especially difficult when the interpreter disagrees with what is being said or feels uncomfortable when profanity is being used. Interpreter/transliterators must remember that they are not at all responsible for what is said, only for conveying it accurately. If the interpreter/transliterators' own feelings interfere with rendering the message accurately, he/she shall withdraw from the situation.

While working from Spoken English to Sign or non-audible spoken English, the interpreter/transliterators should communicate in the manner most easily understood or preferred by the deaf and hard-of-hearing person(s), be it American Sign Language, Manually Coded English, fingerspelling, paraphrasing in non-audible spoken English, gesturing, drawing, or writing, etc. It is important for the interpreter/transliterators and deaf or hard-of-hearing person(s) to spend some time adjusting to each other's way of communicating prior to the actual assignment. When working from Sign or non-audible spoken English, the interpreter/transliterators shall speak the language used by the hearing person in spoken form, be it English, Spanish, French, etc.

INTERPRETER/TRANSLITERATORS SHALL NOT COUNSEL, ADVISE, OR INTERJECT PERSONAL OPINIONS.

Guidelines:

Just as interpreter/transliterators may not omit anything which is said, they may not add anything to the situation, even when they are asked to do so by other parties involved.

An interpreter/transliterators is only present in a given situation because two or more people have difficulty communicating, and thus the interpreter/transliterators's only function is to facilitate communication. He/she shall not become personally involved because in so doing he/she accepts some responsibility for the outcome, which does not rightly belong to the interpreter/transliterators.

INTERPRETER/TRANSLITERATORS SHALL ACCEPT ASSIGNMENTS USING DISCRETION WITH REGARD TO SKILL, SETTING, AND THE CONSUMERS INVOLVED.

Guidelines:

Interpreter/transliterators shall only accept assignments for which they are qualified. However, when an interpreter/transliterators shortage exists and the only available interpreter/transliterators does not possess the necessary skill for a particular assignment, this situation should be explained to the consumer. If the consumers agree that services are needed regardless of skill level, then the available interpreter/transliterators will have to use his/her judgment about accepting or rejecting the assignment.

Certain situations may prove uncomfortable for some interpreter/transliterators and clients. Religious, political, racial or sexual differences, etc., can adversely affect the facilitating task. Therefore, an interpreter/transliterators shall not accept assignments which he/she knows will involve such situations.

Interpreter/transliterators shall generally refrain from providing services in situations where family members, or close personal or professional relationships may affect impartiality, since it is difficult to mask inner feelings. Under these circumstances, especially in legal settings, the ability to prove oneself unbiased when challenged is lessened. In emergency situations, it is realized that the interpreter/transliterators may have to provide services for family members, friends, or close business associates. However, all parties should be informed that the interpreter/transliterators may not become personally involved in the proceedings.

INTERPRETER/TRANSLITERATORS SHALL REQUEST COMPENSATION FOR SERVICES IN A PROFESSIONAL AND JUDICIOUS MANNER.

Guidelines:

Interpreter/transliterators shall be knowledgeable about fees which are appropriate to the profession, and be informed about the current suggested fee schedule of the national organization. A sliding scale of hourly and daily rates has been established for interpreter/transliterators in many areas. To determine the appropriate fee, interpreter/transliterators should know their own level of skill, level of certification, length of experience,

nature of the assignment, and the local cost of living index.

There are circumstances when it is appropriate for interpreter/translators to provide services without charge. This should be done with discretion, taking care to preserve the self-respect of the consumers. Consumers should not feel that they are recipients of charity. When providing *gratis* services, care should be taken so that the livelihood of other interpreter/translators will be protected. A free-lance interpreter/translator may depend on this work for a living and therefore must charge for services rendered, while persons with other full-time work may perform the service as a favor without feeling a loss of income.

INTERPRETER/TRANSLATORS SHALL FUNCTION IN A MANNER APPROPRIATE TO THE SITUATION.

Guidelines:

Interpreter/translators shall conduct themselves in such a manner that brings respect to themselves, the consumers and the national organization. The term "appropriate manner" refers to:

- (a) dressing in a manner that is appropriate for skin tone and is not distracting.
- (b) conducting oneself in all phases of an assignment in a manner befitting a professional.

INTERPRETER/TRANSLATORS SHALL STRIVE TO FURTHER KNOWLEDGE AND SKILLS THROUGH PARTICIPATION IN WORKSHOPS, PROFESSIONAL MEETINGS, INTERACTION WITH PROFESSIONAL COLLEAGUES AND READING OF CURRENT LITERATURE IN THE FIELD.

INTERPRETER/TRANSLATORS, BY VIRTUE OF MEMBERSHIP IN OR CERTIFICATION BY THE R.I.D., INC. SHALL STRIVE TO MAINTAIN HIGH PROFESSIONAL STANDARDS IN COMPLIANCE WITH THE CODE OF ETHICS.

October 1979

Appendix B

AIIC

CODE OF PROFESSIONAL CONDUCT

1983 VERSION

Code of Professional Conduct (English translation of original French version)

ASSOCIATION INTERNATIONALE DES INTERPRETES
DE CONFERENCE
INTERNATIONAL ASSOCIATION OF
CONFERENCE INTERPRETERS

I. PURPOSE AND SCOPE

Article 1

a) This Code of Professional Conduct and Practice (hereinafter called "the Code") lays down the conditions governing the practice of the professional by members of the Association.

b) Members are bound by the provisions of the Code. The Council, with the assistance of the Association's members, shall ensure compliance with the provisions of the Code.

c) Candidates for admission shall undertake to adhere strictly to the provisions of the Code and all other AIIIC rules.

d) Penalties, as provided in the Statutes, may be imposed on any member who infringes the rules of the profession as laid down in the Code.

II. CODE OF ETHICS

Article 2

a) Members of the Association shall be bound by the strictest secrecy, which must be observed towards all persons with regard to information gathered in the course of professional practice at non-public meetings.

b) Members shall not derive any personal gain from confidential information acquired by them in the exercise of their duties as interpreters.

Article 3

Members of the Association shall not accept engagements for which they are not qualified. Their acceptance shall imply a moral undertaking on their part that they will perform their services in a professional manner.*

Article 4

a) Members of the Association shall not accept any employment or situation which might detract from the dignity of the profession or jeopardize the observance of secrecy.

b) They shall refrain from any conduct which might bring the profession into disrepute, and particularly from any form of personal publicity. They may, however, for professional reasons advertise the fact that they are conference interpreters and members of the Association.

Article 5

a) It shall be the duty of members of the Association to afford their colleagues moral assistance and solidarity.

b) Members shall refrain from statements or actions prejudicial to the interests of the Association or its members. Any disagreement with the decisions of the Association or any complaint about the conduct of another

*The moral undertaking given by AIIIC members under article 3 of the Code of Professional Conduct shall apply equally to the performance of services by interpreters who are not members of AIIIC but are engaged through a member.

member shall be raised and settled within the Association itself.

c) Any professional problem which arises between two or more members of the Association may be referred to the Council for arbitration.

d) As regards candidates, however, infringements of the Code or other rules of the Association shall be adjudicated by the Admissions and Language Classification Committee.

Article 6

Members of the Association shall not accept, and still less offer, conditions of work which do not meet the standards laid down in the Code, either for themselves or for interpreters engaged through them.

[Editor's Note: This portion of the AIIIC Code is reproduced by permission.]

EXHIBIT A

SALPOINTE CATHOLIC HIGH SCHOOL

* * *

TRANSPORTATION

As a community school, serving the Greater Tucson Area, Salpointe Catholic is easily accessible through various forms of transportation. For students who do not drive or do not belong to a car pool, the school offers information concerning Tucson Transit Lines and Pima County RideShare.

ACADEMIC PROGRAM

Academic excellence is the trademark of Salpointe Catholic High School. The school is accredited as a college preparatory school by the North Central Association of Colleges and Schools. The academic achievements of our present students, as well as an overwhelming number of our graduates, indicate the strength and fullness of Salpointe Catholic's academic programs. Because over 93% of our graduates do in fact continue their education beyond high school, Salpointe Catholic must provide the necessary motivation and preparation for higher educational success. Our graduation requirements are therefore stricter than other schools in order to assure that each student has the proper preparation for college.

GRADUATION REQUIREMENTS

The Salpointe Catholic curriculum should be viewed as a four-year experience during which the student must accumulate 22 credits to be graduated. However, students are encouraged to opt for 24 credits. Beginning with the class of

1991, an additional religion credit has been added. To meet the needs of students, Salpointe Catholic offers three distinct academic programs, each with a different number of elective options.

1. English	4	Credits
Social Science	3	Credits
Mathematics	3	Credits
Science	3	Credits
Foreign Language	3	Credits
Religion	3	Credits
Electives	5	Credits
Total Credits	24	
2. English	4	Credits
Social Science	3	Credits
Mathematics	3	Credits
Science	2	Credits
Foreign Language	2	Credits
Religion	3	Credits
Electives	7	Credits
Total Credits	24	
3. English	4	Credits
Social Science	3	Credits
Mathematics	3	Credits
Science	2	Credits
Religion	3	Credits
Electives	9	Credits
Total Credits	24	

CREDIT ACCUMULATION

Courses carrying 1 credit meet every day for the entire year. Courses carrying .5 credit may meet every day for an entire semester or alternate days for an entire year. A failure in the first semester may be changed to a D at the department's discretion if the student's work improves to an A or B during the second semester. Students are responsible for

keeping their credits up-to-date, and should refer to the course catalog or their counselor whenever a question arises. Salpointe provides the opportunity and resources for all students to plan and carry out an academic program that meets their needs. Students must, however, avail themselves of these opportunities and take responsibility for their own education. A student who is missing two or more classes (1.0 or more credits), will not be allowed to participate in the graduation exercises.

COURSE LOAD REQUIREMENTS

Freshmen and sophomores are scheduled for six classes. Juniors may take five classes if they have earned 12 credits by the end of sophomore year. Seniors must take enough courses to supply 22 credits by graduation. For example, a senior who has earned 17.5 credits by the end of the junior year must carry 4.5 credits. A student may not register for fewer than 4 credits (4 courses per semester) or more than 6 credits during an academic year. To be promoted to the next grade, students must have the following credits (including all required subjects): 5 credits by the end of freshman year; 10 credits by the end of sophomore year; 16 credits by the end of junior year. Students who are lacking more than 2 credits in any given school year may not return to Salpointe Catholic the following fall semester. Summer school is "a must" for all students who fail any required course(s) and/or more than 1 credit of elective courses. Students who do not repeat and pass these courses during summer school will not be readmitted. It is the summer school student's obligation to have a transcript sent to Salpointe Catholic before school opens in the fall. The required subjects at Salpointe are: (1) all English, Religion, and Social Studies courses;

(2) the first courses in Mathematics; (3) the first two courses in Science.

SUMMER SCHOOL AND OFF-CAMPUS COURSES

In some cases, with prior permission of the Academic Assistant Principal, courses may be taken for Salpointe credit at the University of Arizona and/or Pima Community College.

Summer courses may be taken at any accredited high school or Pima Community College. Students must first secure the necessary forms from the Academic Assistant Principal before enrolling for any summer school courses. Credit for enrichment courses during the summer may be accepted at the discretion of the Academic Assistant Principal. Students should discuss their summer school plans with the Academic Assistant Principal in order to be assured that the credit is accepted at Salpointe Catholic. In general, our policy is to permit supplemental courses for the following reasons: (1) The student cannot fit a desired course into his/her daily schedule. (2) The course is not offered at Salpointe Catholic.

COURSE SELECTION AND CHANGES

Choosing an appropriate program of studies is an important part of each student's high school responsibilities. Parents are encouraged to participate actively in the yearly process of selecting courses that meet the needs of their son/daughter. Alternate courses should also be selected to assist in the scheduling process. Some administrative schedule adjustments may be unavoidable. After a student has been duly registered and has received his/her schedule, he/she

may not change that schedule without prior approval of the Academic Assistant Principal and payment of a \$25 fee (unless the change has been necessitated by an office error). Schedule changes or course drops are permitted only as an exception when one of the following criteria is met: (1) doctor's request (in writing) or teacher's recommendation based on student ability (unless a waiver has been signed); (2) desire to add a course during a free period (if space is available); (3) desire to take a heavier academic load (if space is available); (4) work permit or other such circumstances (letter from employer is required stating the hours and days of work) requesting early dismissal or lighter load; (5) course in question was a second or third choice assigned during scheduling (if space in the first choice is available). Courses will not be dropped simply because they are not needed for graduation. All schedule changes must be approved in writing by the parents of the student.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST, husband and wife;)	
JAMES ZOBREST, a minor, by	)	No. CIV 88-516
LARRY and SANDRA ZOBREST,	)	TUC-RMB
his parents,)	
Plaintiffs,)	
v.)	
CATALINA FOOTHILLS	)	STIPULATION
SCHOOL DISTRICT,	)	OF FACTS
Defendants.)	

The plaintiffs and the defendant, by their attorneys, hereby stipulate and agree that the following is a correct statement of the facts and this litigation:

I. BACKGROUND FACTS AND PARTIES.

1. The plaintiff, JAMES ZOBREST, is a child 14 years of age, who resides with his parents, plaintiffs LARRY ZOBREST and SANDRA ZOBREST, at 5740 N. Chieftan Trail, Tucson, Arizona 85715.

2. Catalina Foothills School District is a public unified school district operating pursuant to Title 15 of the Arizona Revised Statutes. Catalina Foothills School District does not, at the present time, operate or maintain a high school. High school age students residing in Catalina Foothills School District may legally attend any public high school in Arizona, and the tuition therefore is paid by Catalina Foothills School District.

3. The plaintiff James Zobrest and his parents, plaintiffs Larry Zobrest and Sandra Zobrest, are individuals of the Roman Catholic faith.

4. The plaintiff James Zobrest fulfills the requirements of the Arizona compulsory school attendance statute, A.R.S. § 15-802, through attendance at Salpointe Catholic High School.

5. All the plaintiffs reside within the boundaries of Catalina Foothills School District.

6. James Zobrest was born deaf and remains profoundly deaf.

7. James Zobrest is, as of March 1989, enrolled in the ninth grade of Salpointe Catholic High School ("Salpointe"), Tucson, Arizona.

8. Salpointe is located within the boundaries of Amphitheater Unified School District, Tucson, Arizona.

9. Catalina Foothills School District does not pay tuition charges for James Zobrest to attend Salpointe.

10. James Zobrest is a "handicapped person" within the meaning of the Education of The Handicapped Act, 20 U.S.C. § 1401 *et seq.* (the "EHA").

11. Pursuant to the EHA, James Zobrest receives speech therapy services, two times a week for periods of 45 minutes each, from Catalina Foothills School District. The speech therapy services are provided at Orange Grove Junior High School, in Catalina Foothills School District.

12. James Zobrest requires the services of a sign language interpreter in order to obtain the benefit of the regular classroom instruction he receives at Salpointe.

13. Catalina Foothills School District would be obligated under the EHA to pay the cost of a certified sign language interpreter for James Zobrest if he were enrolled in a local public high school.

14. James Zobrest had received all of his education prior to the sixth grade in schools for the deaf including the Arizona School for the Deaf and for the Blind. He attended grades six through eight in a public school in Catalina Foothills School District.

15. There are numerous public high schools in the Tucson area wherein James Zobrest could receive an education in full compliance with the EHA, as well as all state laws relating to education, including the Arizona compulsory school attendance statute, A.R.S. § 15-802. If he chose to attend any of these public high schools, he would be afforded, without cost to his parents, and at the

full expense of Catalina Foothills School District, the services of a sign language interpreter. Catalina Foothills School District would also pay all tuition costs of James Zobrest to attend these public schools.

16. James Zobrest is enrolled at Salpointe for the particular reason that his parents Larry and Sandra Zobrest, desire him to be educated, at the high school level, during his adolescence, in a Roman Catholic educational institution.

17. The parents of James Zobrest desire a Roman Catholic high school education for him due to their sincere religious convictions.

18. There is no doctrine or other rule of the Roman Catholic Church that requires that James Zobrest attend a Catholic high school. The Catholic bishops of the United States, however, in their official pronouncement on education, *TO TEACH AS JESUS DID* (National Conference of Catholic Bishops, 1972), stated: "Christian education is intended to make men's faith become living, conscious, and active, through the light of instruction . . . The Catholic school is the unique setting within which this ideal can be realized in the lives of Catholic children and young people." (Para. 102.) "With the Second Vatican Council we affirm our conviction that the Catholic school retains its immense importance in the circumstances of our times and we recall the duty of Catholic parents to entrust their children to Catholic schools, when and where this is possible, to support such schools to the extent of their ability, and to work along with them for the welfare of their children." (Para. 101).

II. SALPOINTE CATHOLIC HIGH SCHOOL.

19. Salpointe is a private Roman Catholic educational institution for young men and women under the direction of the Carmelite Order of the Roman Catholic Church. Salpointe is pervasively religious in character, and its goal of educating students in a religious atmosphere constitutes an integral part of the religious mission of the Roman Catholic Church.

20. Salpointe gives preference, when considering applications for enrollment, to applicants of the Roman Catholic faith.

21. Salpointe is supported solely by the Roman Catholic Church, the Carmelite Order (a Catholic religious order), gifts and tuition from enrollments. Salpointe receives no state subsidy.

22. The objective of Salpointe is to nurture its students' ability to make moral choices and to instill a sense of Christian values. Salpointe has as its distinguishing purpose the inculcation in its students of the faith and morals of the Roman Catholic Church. Salpointe would not exist but for that goal.

23. Religion is among the required subjects at Salpointe. All students are provided formal instruction in the Roman Catholic faith.

24. Mass is celebrated at Salpointe each school day from 7:55 a.m. until 8:20 a.m. Salpointe strongly encourages Catholic students to attend Mass.

25. Teachers at Salpointe sign a Faculty Employment Agreement which states that "Religious programs

are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other."

26. The Faculty Employment Agreement requires teachers to not only accept, but also to promote, the relationship among the religious, the academic and the extracurricular.

27. The Faculty Employment Agreement states in part the following philosophy for Salpointe's teachers:

"1. Teacher shall at all times present a Christian image to the students by promoting and living the school philosophy stated herein, in the School's Faculty Handbook, the School Catalog and other published statements of this School. In this role the teacher shall support all aspects of the School from its religious programs to its academic and social functions. It is through these areas that a teacher administers to mind, body and spirit of the young men and women who attend Salpointe Catholic High School.

* * *

"3. The School believes that faithful adherence to its philosophical principles by its teachers is essential to the School's mission and purpose. Teachers will therefore be expected to assist in the implementation of the philosophical policies of the School, and to compel proper conduct on the part of the students in the areas of general behavior, language, dress and attitude toward the Christian ideal."

28. Salpointe encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.

29. The Salpointe Faculty/Staff Handbook states that "A lively sense of God's presence and the struggle to experience that presence should permeate the atmosphere of our schools."

30. Salpointe maintains a religious atmosphere within the physical premises of the school through the use of Catholic religious symbols and the observance of Catholic religious customs.

31. The two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe.

32. References or statements of a religious nature may or are likely to occur during the course of one or more of the class sessions, in addition to scheduled religion sessions, in which James Zobrest is in attendance at Salpointe.

33. The parties agree that, for the purpose of this case, the religious character of Salpointe is not limited in any material manner.

III. REGISTRY OF INTERPRETERS.

34. The Registry of Interpreters For the Deaf, Inc. ("Registry") is a nationwide body, with headquarters at 51 Monroe Street, Rockville, MD 20850, which evaluates, tests and certifies individuals who desire to become sign

language interpreters for the deaf and hearing-impaired. A candidate who is found professionally qualified by the Registry becomes a Certified Member of the Registry.

35. Certified members of the Registry are required to interpret according to the Registry's Code of Ethics which defines "interpret" to mean: "Spoken English to American Sign Language; American Sign Language to Spoken English." A Registry-certified sign language interpreter is forbidden by the Code of Ethics to edit in any way communications to and from the deaf person who he or she serves as sign language interpreter.

36. There may be occasions when a sign language interpreter is unable, due to limitations created by the interplay of two separate languages, to effect a perfect or literal translation of communications to or from the hearing impaired person. On such occasions, however, the sign language interpreter attempts to convey as accurately as possible all communications to or from the hearing-impaired person.

37. A sign language interpreter hired to interpret for James Zobrest at Salpointe is required by the Registry's Code of Ethics to interpret (as defined in Paragraph 35) for James Zobrest all communications by James Zobrest's teachers in class, including references or statements of a religious nature.

IV. EVENTS IMMEDIATELY PRECEDING LITIGATION.

38. In October, 1987, anticipating their son's enrollment at Salpointe, Larry and Sandra Zobrest requested Catalina Foothills School District to furnish their son,

James Zobrest, the services of a certified sign language interpreter beginning in August, 1988.

39. On January 8, 1988, the Assistant Superintendent of Catalina Foothills School District sought a legal opinion from the Pima County Attorney, asking for a determination for the legal propriety of the School District's provision of such services.

40. On April 26, 1988, a Deputy Pima County Attorney issued an opinion to Catalina Foothills School District, which stated ~~that the~~ furnishing of the requested sign language interpreter services to James Zobrest at Salpointe Catholic High School would be unlawful under the state and federal constitutions.

41. In an opinion dated June 27, 1988, the Arizona Attorney General concurred with the opinion of the Deputy Pima County attorney. The Attorney General's opinion is denominated I88-072. The plaintiffs were informed of Attorney General Opinion I88-072 by a memorandum from the Assistant Superintendent of Catalina Foothills School District on or about July 12, 1988.

42. It is the agreement of the parties that it would have been futile for Plaintiffs to have pursued administrative "due process" procedures available pursuant to the EHA and 34 C.F.R. §§ 300-500 *et seq.* since the Arizona Attorney General had opined that the School District was forbidden, by both the Arizona and Federal constitutions, to provide the services required by James Zobrest while enrolled in a pervasively religious Catholic high school. Linda S. Pavol, Esq., counsel to the Arizona Department of Education, by affidavit December 29, 1988, a copy of

which is appended as Exhibit A, has stated this conclusion.

43. When classes at Salpointe commenced August 17, 1988, Larry and Sandra Zobrest undertook to hire and pay for the services of a certified sign language interpreter for their son.

44. The cost to Larry and Sandra Zobrest for hiring a certified sign language interpreter for their son is approximately Seven Thousand Dollars (\$7,000.00) per year.

45. The parties stipulate that Defendant's Request for Admissions dated November 1, 1988, and Plaintiffs' Response thereto, dated December 15, 1988, are incorporated herein by reference and may be filed with the Court as part of the record in this action. The parties further stipulate that Plaintiffs' Non-Uniform Interrogatories and Requests For Admissions served November 1, 1988, and Defendants' Answers thereto served December 5, 1988, are incorporated herein by reference and may be filed with the Court as part of the record in this action.

DATED this 6th day of April, 1989.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST,)	NO.
Plaintiff,	)	CIV-88-516-
	)	T-RMB
vs.)	
CATALINA FOOTHILLS	)	July 17, 1989
SCHOOL DISTRICT,	)	2:30 o'clock a.m.
Defendant.	)	Tucson, Arizona
)	

CROSS-MOTIONS FOR SUMMARY JUDGMENT
 Before THE HONORABLE RICHARD M. BILBY
 APPEARANCES:

WILLIAM BENTLEY BALL
 Attorney at Law
 For the Plaintiff

THOMAS BERNING
 Arizona Center for Law
 Attorney at Law
 For the Plaintiff

JOHN C. RICHARDSON
 Attorney at Law
 For the Defendant

Court Reporter: JOHN C. DAVIS
 United States District Court
 P.O. Box 142
 Tucson, Arizona 85702

Proceedings recorded by mechanical stenography, transcript produced from dictation.

[p. 2] PROCEEDINGS

THE CLERK: In Civil 88-516. Larry Zobrest versus Catalina Foothills School District, on for cross-motions for summary judgment.

Counsel please state their appearances for the Court.

MR. BERNING: Tom Berning from the Arizona Center for Law on behalf of the plaintiff.

MR. BALL: William Ball on behalf of the plaintiffs.

MR. RICHARDSON: John Richardson on behalf of the defendant, Catalina Foothills.

THE COURT: Proceed.

MR. RICHARDSON: Your Honor, we have cross-motions for summary judgment, so either one of us could start; do you have a preference?

THE COURT: None whatsoever.

MR. BALL: Your Honor, may it please the Court, first of all, Your Honor, I want to thank you as a Pennsylvania lawyer for your courtesy in permitting me to appear in your court. I want to thank also co-counsel, Thomas Berning, for his great help in this case. And I also have not found greater courtesy than has been shown me by Mr. Richardson.

If Your Honor will indulge me for a moment, I'm sure you have many questions. I would like to begin simply by getting a careful focus on the basic moving facts in this [p. 3] case. They come under three headings. First of all, the deafness of the plaintiff, James Zobrest. Secondly, the

circumstance of his enrollment at Salpointe Catholic School; and, finally, the relief sought.

James Zobrest, as Your Honor knows, is profoundly deaf. He has to have the services of a sign language interpreter in order to be educated. As a deaf person he is within the class of beneficiaries set down in the public policy reflected in Federal Act 94-192 and related Arizona statutes. The sign language interpreter, or the services of such person, are what are known in EHA law as related services. The services among these are interpreter services, transportation services, services which enable a child to get the education that he needs.

The school district agrees that it is under the EHA obligated to furnish these services, but for one fact; namely, they would be rendered, according to the plaintiff's wishes, on the premises of Salpointe Catholic High School where James is enrolled. There is no question here, no issue about cost or administrative means in furnishing the services.

Secondly, as to enrollment, James is enrolled in Salpointe, which is a pervasively religious school; that's a given in the case. He's there because of a command of religious conscience which his parents very strongly have, and that, of itself, allows them no option. They want both the [p. 4] religious formation which would be given at Salpointe, and the general education wherein they fulfill all of the public policy requirements of the compulsory attendance laws of the State of Arizona.

The relief they seek is not money, not funds, it's not subsidy, they simply seek the providing of the services, as

the complaint in their prayer for relief states. And Salpointe is not a party to this action, nor an intervenor, nor has expressed any interest in the case whatsoever.

Now, the school district acknowledges those three sets of facts I have just described, but it says that to give this deaf boy sign language interpreter service, to which he's statutorily entitled, would violate the establishment clause of the Constitution. That, so they say, is because, first of all, it would have a primary effect advancing religion. And, secondly, because it would create excessive church/state entanglement.

And this position on the establishment clause the school district bases on a series of Supreme Court cases which are cited in its brief. Your Honor, not one of the cases is in point, not one is a precedent, not one involves any handicapped person. And that, I think, becomes extremely material, as Your Honor ponders this case, because I think the locus of decisions in this case lies somewhere within the polar assumptions, on the one hand respecting primary effect [p. 5] advancing religion, or primary benefit being to the child. Here I think is where it is on which this case will turn. I think the establishment and the excessive entanglement arguments are marginal, but granted time I'll deal with them, or if granted time I'll deal with them.

We speak then - we raise the question of whether or not the furnishing of services to this boy are going to advance religion, have a primary effect on advancing religion. And here, I think, as I have noted, that no religious body is a party to the case. The high school is not; there are no - there is no transfer of funds taking

place. But also I think we have to see this case against the background of at least three Supreme Court decisions which relate to services to children, namely, of course, the *Everson* busing case of 1947 in which it was held constitutionally not a violation of the establishment clause to bring children directly to the religious school for their religious education; and, again, in *Board of Education versus Allen*, and again in *Meek versus Pittenger*. The holding of the Court was that there could be aid given directly to children.

Now, mainly, I think in background, as we think of cases, there being no precise precedent in the picture, is a case which is very, very close to this, which we have cited also, which is *Witters versus Washington Department of Services for the Blind*. That's a 1986 case. It's the latest [p. 6] expression by the Supreme Court of the United States in this area, and it's a unanimous expression. Here the Court was dealing - I'm reading now from the summary in the Supreme Court Reports - "You have a student attending a Christian college, he's studying to become a pastor, Christian missionary, or a religious youth director, he applies to the state agency for rehabilitation assistance, consisting of payments for his education." The Court held that the aid furnished under Washington's vocational program, rehabilitation program for this blind student to become - to attend a Christian college in order to become a pastor or missionary did not violate the establishment clause.

This case is close to the present case; in each case you have a handicapped person. In that case, in the *Witters* case, you had a cash grant subsidy, and in *Walz versus The Tax Commission*, the Supreme Court noted that it's in the

area of subsidy cash grants that we have the closest proximity to potential establishment clause difficulties. But here the Court allowed state funds to go to this religious institution simply at the will of the recipient.

THE COURT: Did they go to the recipient or to the school?

MR. BALL: It went to the blind person.

THE COURT: It went to the person then?

MR. BALL: It was at his option, known to the [p. 7] Court – in fact, the case originated because he was already enrolled in a religious school, and said that that's where the money was going. So the money at the will of the recipient could be transferred to a public institution or to a religious or other private institution. And the Court did not find this posed any kind of establishment clause difficulty. It's puzzling, therefore, when I saw the brief of our opponents, at page 39, when they speak of the danger of financial aid fortuitously winding up in sectarian hands – that was a cash case, *Witters*. This is not. This is a case simply asking for a service. In *Witters* you had, as here, entitlement already under an act, the entitlement of the Washington rehabilitation statute, and here entitlement under the FDHA.

THE COURT: I guess the only place you can ever become a religious school – or a pastor is a religious school, you can't go to a public school to become a pastor.

MR. BALL: That's right.

THE COURT: So it seems to me that's a little bit of a difference, because here there is available, readily

available, a decent education for youngsters, but at a non-Catholic school.

MR. BALL: Well, it's available only in the sense that – and this applies to the *Witters* case too – where a conscientious choice is made. and here I notice that our opponents in their latest brief somewhat denigrated the [p. 8] religious claim involved here. The facts are very carefully stipulated that the only reason that James Zobrest is enrolled in Salpointe Catholic High School is on account of his parents' religious convictions, and whether the Catholic church mandates that or not is not relevant.

Well, I don't pay any attention to that. It seems to me that the real nub of the whole thing is, it goes back to what we talked about a long time ago in the preliminary injunction, and that is the fact that this signer has to sign everything.

MR. BALL: That's correct.

THE COURT: And that means this person is going to have to sign Catholic theology, which is part and parcel of the religion of the education that the child is going to receive at the high school. I mean, that's one of the reasons, besides the fact that it's one of the best high schools in town and a lot of non-Catholics go there for that reason. But the big thing for that in there, you not only get a good education, but you get a Catholic slant on things, and that's just part of the education.

Now, there is nothing wrong with that, but the signer has to be – without the signer doing it the child cannot receive that religious education.

MR. BALL: He can't receive any of it, the whole educational package - of course, this is the school in which [p. 9] compulsory - in which the curriculum, as required and approved by the state, hence has the whole body of knowledge, history, geography and everything else, and that comes through the same pipeline. But the point is this: As far as - and our opponents seem to have made the distinction, Your Honor, the distinction in the bus case, in the *Everson* case, the Court upheld, over First Amendment objections, the very busing of children to a school where they get the whole package of religious education.

THE COURT: But the busing doesn't convey any religious activity, it just takes you from one spot to another. What is happening here is that there is religious doctrine that is incorporated into the courses, and that is being conveyed word for word by the signer from the teacher, be they lay or church, to the student.

MR. BALL: But, Your Honor, the sine qua non of the busing service, the sine qua non of education for many children attending religious schools is the bus gets them there. And I would say the parallel would be this, Your Honor: If the driver of the bus now began to start from singing hymns or reciting Catechism or starting to read the Bible in the course of that transmission, then you would be having the thing I think you are talking about, the adding by this neutral conduct, and he is a conduit, he is a transmitter, the bus driver, the adding of that, of religious [p. 10] input, whereas, the affidavits very clearly show and the record establishes this interpreter can't do anything of that kind.

But let's suppose that -

THE COURT: Does this interpreter, when they start class with a prayer, does this interpreter sign the prayer?

MR. BALL: Yes, he will. And I think that constitutes no First Amendment offense whatever in terms of support of that interpreter.

We're back to the question, Your Honor, on the merit. We're talking about the primary effect, and it seems to me incredible to say that the fact that this boy receives that service, that service of this registered sign language interpreter, the fact that he receives that as the means of getting an education, which is the conscientious choice of his parents, is not - it creates no primary effect advancing religion. There isn't a case which says that, so we're dealing here, Your Honor, with a new case, a case of first impression. So there isn't any precedent for it. *Witters*, I think, comes quite close; but, in addition, you have to look at the other side of the primary effect.

Primary effect, the primary effect, and it can't be denied, that a tremendous effect of this service to this child is to enable him to learn, to enable him as a beneficiary intended to be so under the Education for the Handicapped Act. [p. 11] He's now told because of one thing, his parents' religious choice, he's now cut off from that. This is what you had in *Sherbert versus Verner*. You had the public funds, an unemployed person, a Seventh Day Adventist, and the State of South Carolina then said: You've been offered a Saturday job, go take it; you are free to take it, you are perfectly free. She said: No, my religious convictions get in the way of that; I can't do it.

It's just a can't, it's a given in that case, as it is here and as it was in *Wisconsin versus Yoder* -

THE COURT: That's not quite right, and I'll tell you why. You know, it's no secret, I have gone to school with all kinds of friends who were Catholic, and many, many of them didn't go to Catholic schools; some did. But if you are a Seventh Day Adventist and you attend the Seventh Day Adventist church, you don't work Saturday any more than if you are an Orthodox Jew you don't do anything from sundown Friday until Saturday or Sunday.

MR. BALL: Your Honor, you are making a religious judgment now in this case.

THE COURT: I'm not making a judgment, I'm making an observation about what people have done.

MR. BALL: Well, Your Honor, what you are saying, I think, Your Honor, is that because the Seventh Day Adventist religion commands you not to work on Saturday, therefore, her situation in *Sherbert* is different from this. In each case, [p. 12] it's not what each church says, it's the religious conscience, what the religious conscience of the individual says; and courts may not say -

THE COURT: But you have told me that this is not religious - not the religious conscience of the child, it's the parents'.

MR. BALL: Well, the parents are plaintiffs in this case, and the child is enrolled there because of their religious conscience. So we have plaintiffs in each case, in *Sherbert* and in this case, and in *Wisconsin versus Yoder*. In each case we have individuals who are before the Court

and who are saying: We have to do a certain thing, or we must abstain from doing a certain thing because not of what the church says, but because of what I believe as a religious person. That's what you have here.

Now, in the *Wisconsin* case and in *Sherbert versus Verner*, and in each of those cases the state said something like what Your Honor has said: Look, you really don't have to - you really can't work on Saturday, or you really - and the *Wisconsin* case - you really can send your kids to a couple of years of public school. Why not? And the court in each case said - the claimant says: I cannot. I cannot; here I stand, I can do no other. In each case the court said - the courts are not going to say: Oh, that's not really a conviction, or you really can work on Saturday. No, [p. 13] if you had that fact here, that is why when we began this case, in our complaint we were speaking of this as a free exercise case. That's because you have here precisely the question, and it's beautifully framed by the court in *Thomas versus The Review Board*, and it says where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious beliefs, thereby putting substantial pressure inherent to modify his behavior to violate those conditions, a burden on religion exists.

This is what you have here. Jimmy Zobrest - forget getting the services to which public policies say you are entitled, do so because you shouldn't have to obey, your parents shouldn't obey their religion. This is what we have involved here. I think that when we are talking about primary effect we come back to *Witters* again. And we ask: What did the Supreme Court ask in that case? Is

any significant portion of this aid going to a religious institution? They said in *Witters*, since it wasn't it didn't pose any serious problem of advancing of religion, though the State of Washington insisted it did.

It's not well suited also as a vehicle for subsidy, the court said in that case. This isn't well suited as a vehicle for subsidy because there is none. We're simply [p. 14] seeking a service to a deaf boy upon which his future depends. In *Witters* they said: This isn't the kind of program that is going to create incentives for sectarian education for millions of people to say: Hey, let's go to this program. Nothing of the kind is involved here. And whatever aid to Salpointe comes out of this clearly falls in the margin.

THE COURT: You've only got about two more minutes.

MR. BALL: Really, Your Honor? I thought I had a half hour.

THE COURT: You do, but you had a half hour for everybody, and if you take the whole half hour then he doesn't get anything.

MR. BALL: Oh, Your Honor, I thought it was a half hour per side. I'm sorry. That is not true?

THE COURT: No, I've got another hearing at 3 o'clock which I can push off a little bit, but I'll give you some more. Just go ahead and finish up.

MR. BALL: Well, I leave then to our brief the whole question about a symbolic union between church and state. The *Grand Rapids* case is simply way wide of the mark. There was a program involving public school

teachers on the premises of forty religious schools with a wide range of courses and then the policing of public and parochial classrooms and alike, and nothing of the kind is involved here.

Now, on excessive entanglements, and I'll wind up [p. 15] with this, Your Honor, our opponents rely principally on the *Aguilar v. Felton*. I begin here in discussing *Aguilar*. I would begin by referring to the very significant statement of the U.S. Secretary of Education, which we have cited, in 1985, right after the *Felton* decision, and he said this: "The Supreme Court has recognized that the implications of one decision within the establishment clause for other cases presenting different facts and circumstances are not always clear. It would therefore be presumptuous for education authorities to extend the *Felton* decision beyond the circumstances clearly addressed by that case. The *Felton* decision need not have the effect of prohibiting on-premises services to private school children in all other federal programs with respect to programs within the Bilingual Education Act and the Education of the Handicapped Act, for example, a prohibition of on-premises services may make it impossible to provide the services required by those statutes." That, I think, is a very good statement relating to the constitutional law as facts and circumstances different.

Thank you, Your Honor.

THE COURT: Okay. Thank you, Mr. Ball.

Mr. Richardson?

MR. RICHARDSON: Your Honor, I just have two or three minutes of comments unless the Court has additional questions.

[p. 16] I think the cross-motions are briefed thoroughly and are before the Court for decision.

On the comments that have been made, I'd just like to point to a couple of things. *Witters*, I believe, is distinguishable. It was a grant of money directly to a recipient in a very general sense. Where that recipient chose to use it was one thing, and very different than placing a publicly paid employee in a classroom on a constant basis with the attendant entanglement that that incurs. In fact, in *Witters* there was no discussion of the entanglement issue, because when the Supreme Court decided to reverse, they remanded it to the court below and said: You have to talk about the entanglement issue here; it hasn't been before the court.

In addition, when they spend a great deal of time talking about the busing situation in *Everson*, I suggest to the Court that all it need do is look to the busing section in *Walter v. Lohman*, that decision. One of the last sections, Section 8 of that opinion, is where they talk about the request by the statute, the state scheme of allowing busing to occur for private school children to the same places the public school children get together. And the court threw it out and said: That's unconstitutional. I think in the language in there, it clearly indicates the division between the type of program that we have here and the busing that was [p. 17] evident in *Everson*, and I think the language there is very clear in that regard.

Third, there is a lot of times in the discussion where the point is made, or the argument is made that we are dealing with one student and therefore it's only incidental. And that's not the incidental benefit analysis that is used by the court. The court says that a benefit is incidental only if the aid is unrelated to the religious-oriented educational function. So, whether it's one student or a thousand students, whether it's one Bible or five hundred Bibles, that is not what the Court is looking at. Transportation is a lot less related than having a public paid employee standing in a classroom repeating Catholic dogma to the student in the classroom.

We are very sensitive to James Zobrest's educational needs, but we have to stay sensitive to the greater interests of the First Amendment in this case.

Last but not least, in their argument they spend a great deal of time talking about therapeutic versus diagnostic services, and the only reason why those public employees were upheld is that there was little direct contact with the students, little or no educational contact, and not closely associated with the educational mission. None of those limitations will exist in this case with an interpreter in a sectarian setting day after day after day.

[p. 18] So unless the Court has anything further, I think the positions are well briefed and we would ask the Court to render a decision accordingly.

THE COURT: Thank you. They are well briefed, Mr. Richardson.

Anyway, I'll surely think about it some and I'll try to get a decision as soon as I can.

Thank you very much, Mr. Ball.

You may be excused.

* * *

[p. 19] CERTIFICATE

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Official Court Reporter

Date
